

The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory

MARK A. GRABER*

President Clinton's policy priorities, particularly his commitment to abortion rights and neglect of rights to basic welfare, are becoming entrenched in the American legal system. These priorities are mirrored by the past twenty-five years of Supreme Court precedent and increasingly shared by liberal constitutional theorists. Whereas Clinton's priorities may simply reflect political opportunism, this Article questions liberal constitutional theorists who similarly support the fundamental rights grounding of Roe and abortion rights, yet fail to consider either similar or varied arguments that promote the right to basic welfare. The Article is a clarion call to liberal constitutional theorists to take a step back from the prevailing Clintonification and reconsider the question of welfare and its place as a priority in liberal constitutional philosophy and the American legal system.

President Clinton's decision to endorse conservative welfare policies by signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996¹ angered most liberals.² Marion Wright Edelman, a former close associate of the Clinton family, declared that the President's "signature on this pernicious bill makes a mockery of his pledge not to hurt children."³ Christopher Dodd, the chairperson of the Democratic National Committee, described the new federal anti-poverty policy as an "unconscionable retreat."⁴

* Associate Professor of Government, University of Maryland at College Park. A.B. 1978, Dartmouth College; J.D. 1981, Columbia University; Ph.D. 1988, Yale University. Thanks to Mark Tushnet, Howard Gillman, Barry Friedman, Gordon Silverstein, and the members of the Dartmouth College Government Department for their helpful comments on earlier drafts of this manuscript.

¹ Pub. L. No. 104-93, 110 Stat. 2105 (to be codified at 42 U.S.C. 1305).

² See Francis X. Clines, *Clinton Signs Bill Cutting Welfare*, N.Y. TIMES, Aug. 23, 1996, at A1.

³ Ann Scales, *Clinton to Sign Welfare Bill into Law*, BOSTON GLOBE, Aug. 22, 1996, at A23. Edelman added that Clinton's decision to sign the welfare bill "will leave a moral blot on his presidency . . . that will never be forgotten." *Id.*

⁴ Clines, *supra* note 2.

Several prominent liberals in the Clinton administration resigned in protest after the welfare bill became law.⁵ More ominously from a left wing perspective, President Clinton's willingness to cooperate with the Republican Congress on welfare policy seems part of a broader administration effort to end the Democratic Party's traditional association with the poor and labor. "[T]hroughout his term," the distinguished columnist E.J. Dionne observes, "Clinton has been more worried about the reactions he got from Wall Street bond traders than from trade unionists."⁶ Many Clintonians, eager to curry favor with the business community,⁷ publicly identify themselves as Eisenhower Republicans rather than as Great Society Democrats.⁸ The label may fit. After reviewing the President's political priorities, Dionne concluded that Clinton is "the most powerful representative of old-fashioned liberal Republicanism in America."⁹

Commentators who note that Clinton's promises do not "last long" and "sound . . . Republican,"¹⁰ however, fail to recognize that President Clinton has demonstrated a remarkable steadfastness on abortion issues. When he campaigned in 1992, Clinton promised to keep abortion legal.¹¹ He has. Less than a week after taking office, Clinton issued orders rescinding the gag rule, permitting abortion in military hospitals overseas, and facilitating the importation of the abortifacient RU-486.¹² Clinton promised to appoint pro-

⁵ See Alison Mitchell, *Two Clinton Aides Resign to Protest New Welfare Law*, N.Y. TIMES, Sept. 12, 1996, at A1 (resignations of Mary Jo Bane and Peter B. Edelman); Barbara Vobeja, *HHS Official Resigns in Protest of Decision to Sign Welfare Bill*, WASH. POST, Aug. 18, 1996, at A18 (resignation of Wendell A. Primus).

⁶ E.J. Dionne, Jr., *Clinton Swipes the GOP's Lyrics*, WASH. POST, July 21, 1996, at C1.

⁷ See, e.g., Susan B. Garland, *Clinton Cozies Up to Business*, BUS. WK., Sept. 12, 1994, at 70 (discussing the connection between Clinton democrats and big business).

⁸ See BOB WOODWARD, *THE AGENDA: INSIDE THE CLINTON WHITE HOUSE* 165 (1994) (indicating that Clinton sarcastically referred to all Democrats as Eisenhower Republicans).

⁹ Dionne, Jr., *supra* note 6.

¹⁰ Susan Molinari, *Speech Delivered to the G.O.P. Delegates by Representative Molinari*, printed in N.Y. TIMES, Aug. 14, 1996, at A18.

¹¹ See Felicity Barringer, *Clinton and Gore Shift on Abortion*, N.Y. TIMES, July 20, 1992, at A10.

¹² See Ann Devroy, *Clinton Cancels Abortion Restrictions of Reagan-Bush Era*, WASH. POST, Jan. 23, 1993, at A1; see also James Bennet, *Abortion-Rights Backers Win High-Level Support*, N.Y. TIMES, Jan. 23, 1997, at A14 ("Mrs. Clinton made clear that efforts supporting abortion rights were a priority for the Administration."). For the text of President Clinton's orders, see Admin. Order, *The Title X "Gag Rule"*, 3 C.F.R. 723 (1993); Admin. Order, *Privately Funded Abortions at Military Hospitals*, 3 C.F.R. 722 (1993); Admin. Order, *Importation of RU-486*, 3 C.F.R. 724 (1993).

choice Justices to the Supreme Court.¹³ He has. His two judicial appointees, Ruth Bader Ginsburg and Stephen Breyer, were both on record, before their nominations, as supporting abortion rights.¹⁴ President Clinton even adopts and maintains pro-choice positions when doing so is politically unpopular. In early April 1996, he vetoed a bill banning partial birth abortions,¹⁵ even though opinion polls suggest that most Americans supported that legislation.¹⁶

President Clinton's policy preferences are remarkably congruent with the dominant pattern of Supreme Court decisions during the past twenty-five years. Seemingly anticipating Clinton's pro-choice commitments, the Burger and Rehnquist Courts have consistently ruled that the right to terminate a pregnancy is a fundamental freedom protected by the due process clauses of the Fifth and Fourteenth Amendments.¹⁷ Likewise, just as Clinton promises to "end welfare as we know it,"¹⁸ so the Justices have abandoned favorable citations to "the new property" as Warren Court liberals knew it.¹⁹ In a series of decisions

¹³ See Barringer, *supra* note 11.

¹⁴ See Linda Greenhouse, *On Privacy and Equality*, N.Y. TIMES, June 16, 1993, at A1; Gwen Ifill, *White House Welcomes Court Nominee*, N.Y. TIMES, May 17, 1994, at A14. Ginsburg had, on several occasions, declared that she fully supported the result, though not the reasoning, of *Roe v. Wade*, 410 U.S. 113 (1973). See Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199 (1992) [hereinafter Ginsburg, *Speaking*]; Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381-83 (1985) [hereinafter Ginsburg, *Thoughts*]. Breyer, as a Circuit Court Judge, voted to strike down the "gag" law, which forbade doctors at federally funded clinics from discussing abortion with their patients. See *Massachusetts v. Secretary of Health & Human Servs.*, 899 F.2d 53 (1st Cir. 1990).

¹⁵ See Todd S. Purdum, *President Vetoes Measure Banning Type of Abortion*, N.Y. TIMES, Apr. 11, 1996, at A1.

¹⁶ The Roper Center reported that, at the time the bill was vetoed, Americans favored a ban on partial birth abortions by a margin of 57%-39%. See Roper Center at the University of Connecticut, *Public Opinion Online*, June 12, 1996, available in LEXIS, News Library, RPol File. President Clinton has indicated that he might sign a ban on partial birth abortions that contained a broader health exemption. See Alison Mitchell, *Clinton, in Emotional Terms, Explains His Abortion Veto*, N.Y. TIMES, Dec. 14, 1996, at A1.

¹⁷ See *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992). Supreme Court Justices have sustained abortion regulation provisions that President Clinton would have likely vetoed. See *id.*; *Rust v. Sullivan*, 500 U.S. 173 (1991); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

¹⁸ Robert Pear, *A Guide to Where the Candidates Stand*, N.Y. TIMES, Nov. 3, 1996, at A38.

¹⁹ See *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970); Charles Reich, *The New Property*, 73 YALE L.J. 733, 785-86 (1964) [hereinafter Reich, *New Property*] (arguing that benefits like unemployment compensation, public assistance, and old age insurance should be regarded as rights); see also Charles Reich, *Individual Rights and Social Welfare: The*

beginning with *Dandridge v. Williams*,²⁰ Supreme Court majorities have consistently ruled that government officials have no constitutional obligation to ensure that all persons in their jurisdictions are provided with certain basic necessities.²¹ Several Justices continue to conduct rear-guard operations against judicial solicitude for abortion rights.²² No Justice on the present court, however, even hints that the Constitution might protect welfare rights. Moreover, no jurist who supports constitutional welfare rights is likely to be appointed to the Court in the near future.²³

More remarkably, many mainstream liberal constitutional theorists share the President and Supreme Court's belief that the Constitution protects abortion rights but not rights to basic necessities. Constitutional defenses of welfare rights went out of fashion sometime during the 1970s. Contemporary legal liberals now devote themselves primarily to developing one defense after another of the result in *Roe v. Wade*.²⁴ Ronald Dworkin and Laurence Tribe, the two most prominent mainstream liberal thinkers in the legal academy, have each written books defending a constitutional right to legal abortion.²⁵ Pro-choice constitutional arguments play major roles in other constitutional law treatises authored by leading liberal law professors and political scientists.²⁶ On

Emerging Legal Issues, 74 YALE L.J. 1245, 1255 (1965) (noting that government welfare entitlements are no longer regarded as gratuities but as essentials).

²⁰ 397 U.S. 471 (1970).

²¹ See *infra* Part II.B.

²² See, e.g., *Casey*, 833 U.S. at 979–1002 (Scalia, J., concurring in part and dissenting in part).

²³ For a discussion of Clinton's priorities when appointing Supreme Court justices, see *infra* notes 296–99 and accompanying text.

²⁴ 410 U.S. 113 (1973).

²⁵ See RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993); LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990).

²⁶ See H.N. HIRSCH, *A THEORY OF LIBERTY: THE CONSTITUTION AND MINORITIES* 29–30, 92–96 (1992); KENNETH L. KARST, *LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* 50–57 (1993); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 270–85 (1993); HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION* 96–123 (1990); Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 95–97, 141–49 (1991). Although he does not discuss *Roe*, Bruce Ackerman defends the right to privacy at length in his magnum opus, *We the People*. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 150–59 (1991). Some liberals suggest that the Court went too fast in *Roe*, but still insist that the Constitution protects the right to abortion. See, e.g., Ginsburg, *Speaking, supra* note 14, at 1198–99; ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 346–52 (1992). Michael Perry is the only clear example of a liberal constitutional theorist not wholeheartedly committed to the result in

the other hand, significant welfare rights cases like *Goldberg v. Kelly*,²⁷ *Shapiro v. Thompson*,²⁸ *Dandridge v. Williams*,²⁹ and *San Antonio Independent School District v. Rodriguez*³⁰ are, by comparison, barely cited, much less discussed by mainstream legal liberals.

Worse, the sparse analysis of welfare rights in recent works is often not very favorable to the cause of poor people. Cass Sunstein maintains that "[n]o one should be deprived of adequate police protection, food, shelter, or medical care,"³¹ but adds that "courts are not to guarantee this form of liberty."³² Dworkin and Tribe go further. When defending themselves against the charge that they import their own view of just public policy into the Constitution, both Tribe and Dworkin point to redistributive programs as an example of just public policies that they do not believe are constitutionally mandated.³³ Good constitutional theorists, these liberal law professors apparently believe, recognize that privacy rights are in the Constitution and that welfare rights are

Roe. See MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 179–89 (1994) (suggesting that legislatures should have the power to ban some, but not all abortions); see also ROGERS M. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* 237 (1990) (not specifically including abortion on a list of fundamental freedoms that would be protected by a court committed to rational liberty). John Hart Ely is the obvious example of a political liberal who rejects the result in *Roe*. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) [hereinafter Ely, *Crying Wolf*]. Ely does so, however, by rejecting the substantive understandings of due process that are central to much liberal constitutional theory. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 43–72 (1980) [hereinafter ELY, *THEORY*]; see also *id.* at 164–70 (offering a far more narrow interpretation than most liberal constitutional theorists of the equal protection rights of women).

²⁷ 397 U.S. 254 (1970) (holding that a state could not terminate welfare benefits without a prior hearing).

²⁸ 394 U.S. 618 (1969) (striking down state residency requirements for welfare eligibility) *overruled in part by* *Edelman v. Jordan*, 415 U.S. 651 (1974).

²⁹ 397 U.S. 471 (1970) (upholding a state regulation that placed a ceiling on the amount of benefits given under the Aid to Families with Dependent Children program regardless of the size of the family receiving the benefits).

³⁰ 411 U.S. 1 (1973) (upholding a state school financing system that relied on local property taxes, and declaring that education is not a fundamental right).

³¹ SUNSTEIN, *supra* note 26, at 138.

³² *Id.* at 139. Sunstein also suggests that "courts, for institutional reasons, ought to play a minor role" in efforts to improve and equalize public education. *Id.* at 140.

³³ See LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 16 (1991); RONALD DWORKIN, *FREEDOM'S LAW* 36 (1996). *But see* HIRSCH, *supra* note 26, at 15 n.56, 25 (citing various constitutional theorists who "derive substantive welfare rights from the equal protection clause").

not.³⁴ Indeed, the only constitutional right to welfare that many liberals are presently willing to defend at any length seems to be the right to a state-financed abortion.³⁵

This Article examines the Clintonification of American law and liberal constitutional theory. Part I documents how liberal law professors have become enamored with abortion or privacy rights while downplaying, if not abandoning, previous liberal commitments to the constitutional rights of the poor. Part II demonstrates that these priorities cannot be fully justified within liberal constitutional theory unless contemporary liberals no longer think that persons have a fundamental human right to be provided with certain basic necessities or, more likely, believe that, for doctrinal or strategic reasons, liberal constitutional theory must accommodate those political and judicial elites who think that persons have no fundamental human or constitutional right to be provided with certain basic necessities. Part III questions the doctrinal and strategic reasons that best explain why liberal constitutional theorists presently place greater emphasis on abortion rights than welfare rights, and suggests that by adhering too strictly to recent judicial precedent, Dworkin, Tribe, and others may unconsciously be participating in the Burger and Rehnquist Courts' subversive effort to convert the federal judiciary into an institution that serves elite interests rather than public values. Finally, Part IV asks liberal constitutional theorists to take a second look at their constitutional priorities. Good liberal reasons may exist for judicial decisions keeping abortion legal, but liberal constitutional theorists should emphasize why the constitutional principles that support the result in *Roe* also justify far greater judicial solicitude for the rights of poor persons than either present judicial practice or present liberal constitutional theory suggests.

The following analysis of abortion and welfare rights in American constitutional law issues two jurisprudential challenges to liberal constitutional theorists. First, Dworkin, Tribe, and others insist that their approach to constitutional interpretation does not constitutionalize every fundamental human

³⁴ Recent anthologies devoted to critical race and feminist theory similarly pay little attention to welfare rights, even though women and persons of color constitute a disproportionate percentage of the poor in the United States. See *APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES* (D. Kelly Weisberg ed., 1996); *FEMINIST LEGAL THEORY: FOUNDATIONS* (D. Kelly Weisberg ed., 1993); *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado ed., 1995); see also Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 553 (1984) (complaining that "[n]either lawyers nor political activists receive much enlightenment from Critical legal theory with regard to their actual work").

³⁵ See, e.g., TRIBE, *supra* note 25, at 206-07; DWORKIN, *supra* note 25, at 174-76.

right. Their claim that welfare rights are a good example of a fundamental human right that is not a fundamental constitutional right, however, seems to be a mistaken application of their theories. Liberals who maintain that abortion is a fundamental constitutional right and that welfare is a fundamental human right cannot, I believe, consistently deny that welfare is also a fundamental constitutional right. The jurisprudential logic underlying liberal (and liberal feminist) defenses of *Roe* should compel persons, who believe that the provision of certain basic necessities is a fundamental human right, to conclude that the provision of those basic necessities is also a fundamental constitutional right. This limited claim, of course, hardly constitutes a full-fledged justification of constitutional welfare rights. That would require both a defense of a fundamental human right to certain basic necessities (which I endorse) and a defense of the jurisprudential logic underlying liberal defenses of *Roe* (which I question).³⁶ No such arguments appear in this paper. I merely note the ascendancy in liberal constitutional theory during the past twenty-five years of abortion rights at the expense of welfare rights, and question whether liberals whose pro-choice convictions are considerably stronger than mine should maintain their present constitutional priorities.³⁷ If Dworkin, Tribe, and others wish to exclude some fundamental human rights from the American constitutional universe, they must offer stronger reasons to justify that exclusion than the reasons they give for ruling out a judicially enforceable constitutional right to welfare.

Second, the following pages also challenge the liberal concern with this exclusion problem, namely the perceived need for constitutional theories to establish strong barriers against the constitutional incorporation of all fundamental human rights. Good reasons exist why the federal judiciary should not abruptly announce broad constitutional guarantees without establishing precedential support for such rulings.³⁸ These reasons, however, should not inhibit constitutional commentators from urging courts to begin moving toward constitutionalizing what they believe to be basic human rights. Constitutions that cannot be easily amended will not remain viable in the long run if they cannot

³⁶ See MARK A. GRABER, *RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS* 26–29 (1996) (questioning the jurisprudential logic underlying the liberal defenses of *Roe*).

³⁷ For a similar kind of argument, see Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991) (questioning whether persons who believe the Constitution requires government to fund abortions for poor women can consistently deny that the Constitution also requires government to fund religious education for poor children).

³⁸ See *infra* notes 373–85 and accompanying text.

be interpreted as protecting rights that many citizens regard as fundamental.³⁹ Thus, conservative proclamations to the contrary, liberal constitutional theories actually suffer far more from inclusion than exclusion problems. By permitting, for doctrinal or strategic reasons, recent precedent to establish an absolute bar to judicially enforceable welfare rights, Tribe, Dworkin, and others may be building unnecessary barriers to the constitutional incorporation of a fundamental human right.

This essay uses "liberal" in a popular rather than a philosophical sense. Liberals, for present purposes, are people who say that they are liberals when asked whether they are liberals, conservatives, or moderates. Such people tend to support more federal spending for the poor and a more progressive tax code. They tend to oppose increased spending for defense and state regulation of consensual adult sexual behavior. Legal liberals prefer the Warren Court to the Rehnquist Court.⁴⁰ They tend to admire the jurisprudence of Justices Brennan and Marshall, and criticize the jurisprudence of Justices Scalia and Thomas.⁴¹ Cass Sunstein, a republican thinker,⁴² and Michael Sandel, a communitarian,⁴³ are political liberals. Richard Posner and Richard Epstein, two classical philosophical liberals,⁴⁴ are not political liberals.

I. FROM POVERTY TO ABORTION

Long, long ago in a galaxy far, far away, expanding the rights of poor people was a central goal of liberal constitutional theory. Young law professors achieved academic stardom by publishing, in the most prestigious law reviews, arguments justifying judicial protection of welfare rights. Two articles proved particularly influential: Charles Reich's, *The New Property*,⁴⁵ and Frank Michelman's, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*.⁴⁶ Reich's essay maintains that the liberal aspirations of American constitutionalism can be realized under modern economic conditions only if

³⁹ See *infra* notes 368-72 and accompanying text.

⁴⁰ See HIRSCH, *supra* note 26, at 4.

⁴¹ See, e.g., SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS 7 (1984) (stating that his proposals and positions are closer to Justice Marshall's position).

⁴² See, e.g., Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) (exploring the implications of Republicanism for modern public law).

⁴³ For an example of Sandel's views, see MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT (1996).

⁴⁴ For examples of their views, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1977); RICHARD A. EPSTEIN, TAKINGS (1985).

⁴⁵ Reich, *New Property*, *supra* note 19.

⁴⁶ 83 HARV. L. REV. 7 (1969).

welfare beneficiaries enjoy the constitutional rights traditionally associated with more conventional forms of property. "The grant, denial, revocation, and administration of all types of government largess," he insisted, "should be subject to scrupulous observance of fair procedures" as those procedures are defined by the safeguards of the Bill of Rights.⁴⁷ Reich argued that the government was constitutionally obligated to provide the services impecunious citizens needed to survive. He maintained that those forms of "largess" which are closely linked to status must be deemed to be held as of right, and that "[t]he concept of right," in his view, "is most urgently needed with respect to benefits like unemployment compensation, public assistance, and old age benefits."⁴⁸

Michelman's effort to "elaborat[e] [the] constitutional rights pertaining to the status of being poor" focused more explicitly on state obligations to provide various necessities to needy individuals.⁴⁹ All persons, his writings proclaim, have a constitutional right to "minimum protection against economic hazard."⁵⁰ As spelled out in later articles, Michelman interpreted "minimum protection" as requiring "constitutional rights to provision for certain basic ingredients of individual welfare, such as food, shelter, health care, and education."⁵¹

Other influential essays similarly attempted to "transform the widely held notion of welfare as a privilege into a right."⁵² Edward Sparer, "the welfare law guru,"⁵³ led the call for constitutional scholarship that would interpret "the equal protection clause . . . [as] impos[ing] a governmental obligation to sustain the lives of those who would otherwise perish."⁵⁴ Jacobus tenBroek, Thomas

⁴⁷ Reich, *New Property*, *supra* note 19, at 783.

⁴⁸ *Id.* at 785.

⁴⁹ Michelman, *supra* note 46, at 16. For other parts of this doctrinal project, see Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 (1979) [hereinafter Michelman, *Welfare Rights*] (defending his welfare rights thesis against various criticisms); Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS: NOMOS XVIII 126 (J. Roland Pennock & John W. Chapman eds., 1977); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973) [hereinafter Michelman, *Pursuit*].

⁵⁰ Michelman, *supra* note 46, at 13.

⁵¹ Michelman, *Welfare Rights*, *supra* note 49, at 659.

⁵² JACK GREENBERG, LITIGATION FOR SOCIAL CHANGE 25 (1974).

⁵³ MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973, at 22 (1993).

⁵⁴ Edward V. Sparer, *The Right to Welfare*, in THE RIGHTS OF AMERICANS 91 (Norman Dorsen ed., 1971) [hereinafter Sparer, *Right*]; see also Edward V. Sparer, *The Role of the Welfare Client's Lawyer*, 12 UCLA L. REV. 361, 362-66 (1965) [hereinafter Sparer, *Role*] (analyzing the implications of characterizing welfare benefits as either a right or a charity); DAVIS, *supra* note 53, at 37 (discussing Sparer's views on welfare benefits).

Grey, and the young Laurence Tribe were among the prominent law professors who answered by urging federal courts to require state governments to provide basic services to poor people.⁵⁵ Tribe, in 1977, for example, called on the federal judiciary to recognize "constitutional rights to . . . the basic human needs of physical survival and security, health and housing, employment and education."⁵⁶ As late as 1986, Charles Black declared that he would spend the rest of his life "arguing . . . the case for the proposition that a constitutional justice of livelihood should be recognized."⁵⁷

Prominent liberal organizations dedicated themselves to fighting for these constitutional rights.⁵⁸ As Susan Lawrence and Martha Davis ably document, the Legal Services Organization and Sparer's Center on Social Welfare Policy were able, during the late 1960s and early 1970s, to place the rights of poor people on the agenda of the Supreme Court and win several important victories.⁵⁹ The 1968 Biennial Conference of the American Civil Liberties Union (ACLU) demanded that the federal government guarantee poor people a minimum income.⁶⁰ Various rights of poor people were discussed at length in the ACLU's 1971 anthology, *The Rights of Americans*.⁶¹ Litigation campaigns

⁵⁵ See JACOBUS TENBROEK, *FAMILY LAW AND THE POOR: ESSAYS BY JACOBUS TENBROEK* (Joel F. Handler ed., 1971); Thomas C. Grey, *Procedural Fairness and Substantive Rights*, in *DUE PROCESS: NOMOS XVIII*, *supra* note 49, at 182; Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977); see also Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 62 (1977); Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969) (suggesting increased judicial concern with the housing rights of the poor).

⁵⁶ Tribe, *supra* note 55, at 1066.

⁵⁷ Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1113 (1986) [hereinafter Black, Jr., *Reflections*]; see also CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* 131-39 (1997) (defending constitutional welfare rights).

⁵⁸ The original goals and strategies of the legal movement for welfare rights are clearly set out in Edward V. Sparer, *Social Welfare Law Testing*, PRAC. LAW., Apr. 1966, at 13.

⁵⁹ See DAVIS, *supra* note 53 (describing the efforts of the Center on Social Welfare Policy and Law to argue welfare rights cases before the Supreme Court); SUSAN E. LAWRENCE, *THE POOR IN COURT* 8-9 (1990); see also GREENBERG, *supra* note 52, at 23-31 (describing strategies of the Center on Social Welfare Policy and Law for getting welfare rights cases before the Supreme Court).

⁶⁰ See SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* 313 (1990); see also Norman Dorsen, *Introduction to THE RIGHTS OF AMERICANS*, *supra* note 54, at xiii-xvi.

⁶¹ See Frank I. Michelman, *The Right to Housing*, in *THE RIGHTS OF AMERICANS*, *supra* note 54, at 43-64; Sparer, *Right*, *supra* note 54, at 65-93; Leonard B. Boudin, *The Right to*

for welfare rights were one of five case studies that Jack Greenberg, then director of the NAACP Legal Defense Fund, thought to be of sufficient importance to detail in his casebook, *Judicial Process and Social Change*.⁶²

Today, the place of pride in liberal constitutional thought is occupied by abortion, an issue of far less importance than welfare to mainstream liberal lawyers during the 1960s and the first years of the 1970s.⁶³ Hardly a month goes by during the 1990s without some "new" defense of abortion coming out in a law review.⁶⁴ New books providing alternative grounds for *Roe* clutter bookshelves and bookstores.⁶⁵ Most significantly for present purposes, abortion and privacy rights play prominent roles in grand constitutional theory, the central enterprise of the contemporary legal academy. As Michael Perry notes, "*Roe v. Wade* has been the principal text (or subtext) of constitutional theory

Travel, in THE RIGHTS OF AMERICANS, *supra* note 54, at 381-98.

⁶² JACK GREENBERG, CASES AND MATERIALS ON JUDICIAL PROCESS AND SOCIAL CHANGE: CONSTITUTIONAL LITIGATION 237-326 (1977).

⁶³ Abortion rights were barely mentioned in Greenberg's casebook, *see id.* at 400, and only briefly defended in the ACLU's 1971 anthology, *The Rights of Americans*, *see* Charles Lister, *The Right to Control the Use of One's Body*, in THE RIGHTS OF AMERICANS, *supra* note 54, at 358-62. The chapters in *The Rights of Americans* devoted to gender and privacy rights do not discuss abortion. *See* Kent Greenawalt, *The Right of Privacy*, in THE RIGHTS OF AMERICANS, *supra* note 54, at 299-325; Pauli Murray, *The Rights of Women*, in THE RIGHTS OF AMERICANS, *supra* note 54, at 521-23.

⁶⁴ For some recent examples, *see* Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 AM. U. L. REV. 77 (1995) (arguing that equal protection arguments should be integrated into the existing due process framework as a means of approaching the abortion debate); Robert D. Goldstein, *Reading Casey: Structuring the Woman's Decisionmaking Process*, 4 WM. & MARY BILL OF RTS. J. 787 (1996) (analyzing the limits that *Casey* places on a state's ability to regulate abortion); Julia E. Hanigsberg, *Homologizing Pregnancy and Motherhood: A Consideration of Abortion*, 94 MICH. L. REV. 371 (1995) (discussing how neither side of the abortion debate adequately addresses the fundamental concerns of the opposing side); Donald P. Judges, *Taking Care Seriously: Relational Feminism, Sexual Difference, and Abortion*, 73 N.C. L. REV. 1323 (1995) (discussing the concept of relational feminism and the support it provides for abortion rights); Susan E. Looper-Friedman, *"Keep your laws off my body": Abortion Regulation and the Takings Clause*, 29 NEW ENG. L. REV. 253, 257 (1995) (arguing that "there is a property interest in the human body and that abortion restrictions may result in unconstitutional takings of such property"). For a rare piece that combines a defense of abortion with a defense of welfare rights, *see* Susan Frelich Appleton, *Standards for Constitutional Review of Privacy-Invasive Welfare Reforms: Distinguishing the Abortion-Funding Cases and Redeeming the Undue-Burden Test*, 49 VAND. L. REV. 1 (1996).

⁶⁵ For recent examples, *see* GRABER, *supra* note 36; EILEEN L. McDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* (1996); KATHY RUDY, *BEYOND PRO-LIFE AND PRO-CHOICE: MORAL DIVERSITY IN THE ABORTION DEBATE* (1996).

for the last twenty years."⁶⁶

With the clear exception of John Hart Ely, and the possible exception of Perry,⁶⁷ liberal grand constitutional theorists spend much energy demonstrating that *Roe* has strong constitutional foundations. Cass Sunstein derives abortion rights from the general constitutional ban on legislation that "turn[s] morally irrelevant characteristics—most conspicuously race and sex—into systemic sources of social disadvantage."⁶⁸ Dworkin derives abortion rights from the general principle that "government treat everyone subject to its dominion with equal concern and respect."⁶⁹ Tribe offers a third variation on these egalitarian themes. "Laws restricting access to abortion," he claims, "place a real and substantial burden on women's ability to participate in society as equals."⁷⁰ Prominent liberal theorists think that the result in *Roe* should be obvious to any intelligent American constitutionalist. "The right of procreative autonomy," Dworkin writes, "follows from any competent interpretation of the due process clause and of the Supreme Court's past decisions applying it."⁷¹

Welfare rights, by comparison, play very little role in grand constitutional theory.⁷² The major works of that genre do not discuss the rights of poor people at length. Many do not even mention such cases as *San Antonio Independent School District v. Rodriguez*⁷³ or *Goldberg v. Kelly*.⁷⁴ Although liberal constitutional theorists proclaim their support for more egalitarian economic policies, influential works suggest that significant institutional and constitutional limits exist on the judicial capacity to facilitate such policies. Sunstein proclaims that courts should protect abortion rights in order to prevent "morally irrelevant characteristics" from becoming "systemic sources of

⁶⁶ PERRY, *supra* note 26, at 180; *see* DWORKIN, *supra* note 33, at 41 ("[A]bortion . . . has dominated constitutional argument . . . for decades.").

⁶⁷ *See* PERRY, *supra* note 26.

⁶⁸ SUNSTEIN, *supra* note 26, at 258.

⁶⁹ DWORKIN, *supra* note 33, at 73.

⁷⁰ TRIBE, *supra* note 25, at 105. More recently, Tribe and Michael Dorf have derived privacy rights from "a fundamental right of individuals to structure their family interactions as they see fit." TRIBE & DORF, *supra* note 33, at 52.

⁷¹ DWORKIN, *supra* note 25, at 160; *see also id.* at 168 ("[A]ny competent interpretation of the Constitution must recognize a principle of procreative autonomy . . ."); *see also* GRABER, *supra* note 36, at 123-24, 130-31.

⁷² *See* Mark Tushnet, *The Bricoleur at the Center*, 60 U. CHI. L. REV. 1071, 1074-75 (1993) (noting that contemporary liberal constitutional theorists are abandoning a "traditionally 'left' position" which "focused importantly on the reduction in severe disparities in material well-being" (emphasis omitted)).

⁷³ 411 U.S. 1 (1973).

⁷⁴ 397 U.S. 254 (1970).

disadvantage.”⁷⁵ He maintains, however, that courts can do little when legislation in effect turns poverty, presumably a *morally irrelevant characteristic*,⁷⁶ into a *systemic source of social disadvantage*.⁷⁷ Tribe (implicitly recanting his 1977 defense of welfare rights)⁷⁸ and Dworkin explicitly assert that the Constitution does not protect welfare rights. “[I]t is quite impossible to read *our* Constitution,” Tribe and Dorf recently declared, “as including . . . provision[s] guaranteeing decent housing and employment for every person.”⁷⁹ Although Dworkin “defend[s] a theory of economic justice that would require substantial redistribution of wealth in rich political societies,” he “insist[s] that integrity would bar any attempt to argue from the abstract moral clauses of the Bill of Rights, or from any other part of the Constitution, to any such result.”⁸⁰ Lest the reader be unclear as to the target of Dworkin’s scorn, he specifically cites Michelman’s *Harvard Law Review* article, *On Protecting the Poor Through the Fourteenth Amendment*,⁸¹ as an example of a defense of poverty rights that, in Dworkin’s view, violates constitutional integrity.⁸²

Liberal law professors do fight hard for the rights of the poor. Law school clinics attract many students committed to helping the less fortunate, and the adventures of legal clinicians fill up the law reviews.⁸³ A recent essay

⁷⁵ SUNSTEIN, *supra* note 26, at 259.

⁷⁶ See *Edwards v. California*, 314 U.S. 160, 184–85 (1941) (Jackson, J., concurring) (“The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color.”).

⁷⁷ See SUNSTEIN, *supra* note 26, at 138–40 (suggesting that “the role of courts . . . will be limited” in realizing such constitutional concerns as “freedom from desperate conditions,” “opposition to caste systems,” and “rough equality of opportunity”). For similar concerns, see ELY, *THEORY*, *supra* note 26, at 162 (noting that because laws disadvantaging poor people can typically be justified using “constitutionally innocent terms,” courts will not be able to protect welfare rights).

⁷⁸ See *supra* note 55 and accompanying text.

⁷⁹ TRIBE & DORF, *supra* note 33, at 16.

⁸⁰ DWORKIN, *supra* note 33, at 36; see also RONALD DWORKIN, *LAW’S EMPIRE* 382 (1986) [hereinafter DWORKIN, *EMPIRE*] (“The Constitution cannot seriously be read as demanding that the nation and every state follow a utilitarian or libertarian or resource-egalitarian or any other particular conception of equality . . . for pursuing the general welfare.”).

⁸¹ Michelman, *supra* note 46.

⁸² DWORKIN, *supra* note 33, at 36, 351 n.26.

⁸³ For a sampling of the literature, see Cathy Lesser Mansfield, *Deconstructing Reconstructive Poverty Law: A Practice-Based Critique of the Storytelling Aspects of the Theoretics of Practice Movement*, 61 BROOK. L. REV. 889 (1995); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991).

comments that "legal scholars have shown renewed interest in the theory and practice of poverty law."⁸⁴ Even an article defending the constitutional rights of the poor appears occasionally.⁸⁵ Most importantly, even those liberal constitutional theorists who do not think that the Supreme Court should promote greater economic equality maintain that such policies ought to be promoted by the legislature.⁸⁶ No liberal law professor explicitly or implicitly defends President Clinton's decision to sign the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

Still, the status of poverty rights in legal scholarship has changed dramatically during the past thirty years. Poverty law may be a hot topic in the law reviews, but the articles' primary concern is "the relationship between poverty lawyers and their clients,"⁸⁷ not the constitutional rights of the poor. An occasional article calling for the judiciary to protect constitutional rights to welfare does appear, but those articles are no longer at the cutting edge of legal scholarship. The most prestigious enterprise in the contemporary legal academy is grand constitutional theory, and the rights of the poor play almost no role in that undertaking. In liberal grand constitutional theory, abortion or privacy is typically thought to be the paradigmatic constitutional right that the judiciary must protect. Rights to livelihood are mentioned, if mentioned at all, as either the paradigmatic constitutional right that courts should not protect or the paradigmatic just policy that is not constitutionally mandated.

II. ABORTION AND WELFARE IN LIBERAL CONSTITUTIONAL THOUGHT

Three considerations may explain why liberal constitutional theorists presently work harder to secure abortion rights than welfare rights: constitutional norms, strategic concerns, and moral values. Liberal constitutional theorists may make greater efforts to defend abortion rights than welfare rights because they believe that abortion rights have stronger constitutional foundations than welfare rights. Alternatively, liberal law professors may vigorously defend the result in *Roe*⁸⁸ while muting their criticisms of the result in *Dandridge*⁸⁹ (and related cases)⁹⁰ because they believe

⁸⁴ Matthew Diller, *Poverty Lawyering in the Golden Age*, 93 MICH. L. REV. 1401, 1402 (1995).

⁸⁵ See, e.g., Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277 (1993); Appleton, *supra* note 64 (advocating constitutional challenges to privacy-invading welfare reforms).

⁸⁶ See *supra* notes 72-79 and accompanying text.

⁸⁷ Diller, *supra* note 84, at 1402; see also *supra* note 83.

⁸⁸ 410 U.S. 113 (1973).

⁸⁹ 397 U.S. 471 (1970).

liberals are more likely to persuade the present federal judiciary to reaffirm precedent protecting abortion rights than to overrule precedent rejecting welfare rights. Finally, the public priorities of Dworkin, Tribe, and other pro-choice constitutionalists may reflect their belief that persons have a fundamental human right to terminate a pregnancy but no fundamental human right to be provided with those basic necessities that they cannot otherwise secure for themselves.

These constitutional, strategic, and moral explanations of liberal practice are not mutually exclusive. Constitutional theorists may not believe that "the Constitution is what the justices say it is,"⁹¹ but most legal commentators regard doctrinal arguments based on past precedent as one legitimate method of interpreting that text.⁹² "[T]he elaboration of constitutional values," Tribe insists, "proceeds mostly from prior decisions."⁹³ Dworkin similarly maintains that judges must "always try to connect the justification [they] provide[] for an original decision with decisions that other judges or officials have taken in the past."⁹⁴ Liberals who believe that past precedent constrain present constitutional choices may therefore use recent judicial practice in abortion and welfare cases both to predict what rights the Supreme Court will protect and to evaluate what rights the Supreme Court should protect.

Liberal constitutional theorists also insist that moral values should influence constitutional interpretation. Dworkin and Tribe vigorously maintain a distinction between constitutionality and justice,⁹⁵ but each insists that

⁹⁰ See *supra* notes 27–30 and accompanying text.

⁹¹ CHARLES EVANS HUGHES, Speech Before the Elmira Chamber of Commerce, ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES, GOVERNOR OF NEW YORK, 1906–08, at 139 (1980).

⁹² See, e.g., PHILIP BOBBITT, CONSTITUTIONAL FATE 39–58 (1982) (describing the approach of deriving principles from precedent or from judicial or academic commentary on precedent).

⁹³ TRIBE & DORF, *supra* note 33, at 71.

⁹⁴ RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 112 (1978) [hereinafter DWORKIN, TAKING RIGHTS]; see also *id.* at 110–15 (describing the use of precedent in judicial decisionmaking); DWORKIN, EMPIRE, *supra* note 80, at 225–75 (1986) (arguing that legal claims are interpretive judgments that combine both precedential and forward-looking elements); DWORKIN, *supra* note 33, at 199 (noting that, in the context of the First Amendment, "[c]ontemporary lawyers and judges must try to find a political justification . . . that fits most past constitutional practice, including past decisions of the Supreme Court").

⁹⁵ See TRIBE & DORF, *supra* note 33, at 14–16; DWORKIN, *supra* note 33, at 10–11; see also SUNSTEIN, *supra* note 26, at 7–8 (noting that the Constitution should not mean whatever a judge thinks it ought to mean); James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 218, 280, 290, 302 (1993) (positing a theory of constitutional interpretation that is distinct from a "theory of constructing a perfectly just

constitutional decisions inevitably require value choices. Dworkin "encourages lawyers and judges to read an abstract constitution in light of what they take to be justice."⁹⁶ Although Tribe is somewhat more restrained,⁹⁷ he agrees that "[c]onstitutional value choices cannot be made . . . without recourse to a system of values that is at least partly external to the constitutional text."⁹⁸ Thus, within liberal theory, arguments demonstrating that some abortion or welfare policy is just may be used to explain why that policy is constitutionally mandated. Dworkin concludes that it is "unlikely that anyone who believes that free and equal citizens would be guaranteed a particular individual right will not also think our Constitution already contains that right, unless constitutional history has decisively rejected it."⁹⁹

Unfortunately, no liberal constitutional theorist explains at any length why *constitutional history has decisively rejected* the right to livelihood but not the right to terminate a pregnancy.¹⁰⁰ Without giving any reason for his conclusion, Dworkin flatly asserts that no constitutional right to welfare exists.¹⁰¹ Tribe's recent discussions of the constitutional rights of poor people briefly observe that the Constitution is "not [an] altogether egalitarian document,"¹⁰² point out that

Constitution").

⁹⁶ DWORKIN, *supra* note 33, at 37; *see also id.* at 2-4, 319 (advocating a moral reading of the Constitution).

⁹⁷ *See* TRIBE & DORF, *supra* note 33, at 17 (explicitly advocating a theory of interpretation less sweeping than Dworkin's).

⁹⁸ *Id.* at 67. For similar views, *see* SUNSTEIN, *supra* note 26, at 8 (noting that even though interpretation of the Constitution is not value-neutral, it is not subjective); Erwin Chemerinski, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 47, 90, 95-104 (1989) (arguing that judicial value choices are both desirable and inevitable in deciding constitutional issues).

⁹⁹ DWORKIN, *supra* note 33, at 73. Dworkin added, "any moral right as fundamental as the right of procreative autonomy is very likely to have a safe home in the Constitution's text." *Id.* at 104.

¹⁰⁰ Several commentators have sought to explain in political rather than jurisprudential terms why the Burger and Rehnquist Courts have offered more protection for abortion than welfare rights. *See* Mark Tushnet, ". . . And Only Wealth Will Buy You Justice"—Some Notes on the Supreme Court, 1972 Term, 1974 WIS. L. REV. 177 (1974) (arguing that a majority of the Court during the 1972 term was only willing to find constitutional violations when people like themselves would be benefitted); Martin Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 218-33 (Vincent Blasi ed., 1993) (discussing how social and political factors influenced the Warren and Burger Courts). Such explanations will be discussed below. *See infra* notes 393-97 and accompanying text.

¹⁰¹ *See* DWORKIN, *supra* note 33, at 36.

¹⁰² LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1672 (2d ed. 1988).

the Constitution clearly recognizes some private property rights,¹⁰³ and note a constitutional “tilt against redistribution.”¹⁰⁴ Nowhere does Tribe explain why the Constitution’s commitment to a market economy¹⁰⁵ compels constitutional commentators or authorities to reject all constitutional welfare rights. A *not altogether egalitarian document* that recognizes private property and *tilts against redistribution* might nevertheless guarantee all persons a right to a bare minimum, while forbidding government programs that directly reduce wealth inequalities more substantially. Moreover, Tribe never explains why the same *not altogether egalitarian document* that fails to protect welfare rights is *sufficiently egalitarian* to guarantee women the procreative rights necessary for them to compete as equals in the workplace. Tribe’s readers may also wonder why what seems to be a *not altogether libertarian document*¹⁰⁶ nevertheless protects the privacy rights of homosexuals.¹⁰⁷

These current liberal priorities do not follow from the general approaches that liberal constitutional theorists take when interpreting the Constitution. The broad constitutional principles that liberals use to derive the right to terminate a pregnancy are used by social democrats to derive rights to livelihood. Assertions that the Constitution requires that “government treat everyone subject to its dominion with equal concern and respect,”¹⁰⁸ for example, do not explain why liberal law professors spend so much energy defending *Roe* and so little energy criticizing *Rodriguez* or *Dandridge*.¹⁰⁹ The central historical weaknesses of the constitutional case for the right to livelihood correspond to the central historical weaknesses of the constitutional case for the right to terminate a pregnancy. Rights to a survival income may lack strong roots in the specific words of the constitutional text and in the specific intentions of the persons responsible for the Constitution,¹¹⁰ but abortion rights have no stronger roots in the specific words of the constitutional text or in the specific intentions

¹⁰³ See TRIBE & DORF, *supra* note 33, at 22, 70, 77, 110.

¹⁰⁴ LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 165 (1985).

¹⁰⁵ See Stephen L. Elkin, *Madison and After: The American Model of Political Constitution*, 44 POL. STUD. 592, 592–93 (1996) (noting that Americans, through their Constitution, have left control of productive assets in the hands of the private person).

¹⁰⁶ *The Federalist Papers*, in particular, places much more emphasis on empowering government than on protecting individual liberties. See THE FEDERALIST NO. 23, at 153–57 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *id.* NO. 84, at 512–14; see also *What the Anti-Federalists Were For*, in 1 THE COMPLETE ANTI-FEDERALIST 71 (Herbert J. Storing ed., 1981); Elkin, *supra* note 105, at 592.

¹⁰⁷ See TRIBE & DORF, *supra* note 33, at 116–17.

¹⁰⁸ DWORKIN, *supra* note 33, at 73; see also *id.* at 75 (“The Constitution guarantees the rights required by the best conceptions of the political [ideal] of equal concern.”).

¹⁰⁹ See *infra* notes 137–202 and accompanying text.

¹¹⁰ See *infra* notes 118–19 and accompanying text.

of the persons responsible for the Constitution.¹¹¹

The constitutional priorities of contemporary liberal constitutionalists are best explained by contemporary political and legal trends. Liberal constitutional theorists may not believe that abortion rights are constitutionally or morally more fundamental than welfare rights, but crucial federal judges and their political sponsors apparently do.¹¹² The Burger and Rehnquist Courts have demonstrated far more solicitude for abortion rights than for welfare rights.¹¹³ Politically influential senators and interest groups are far more eager to ensure that new judicial appointments will be pro-*Roe* than anti-*Dandridge*. Writing in this political and legal environment, liberal constitutional theorists committed both to precedent and to securing favorable rulings may see themselves as forced to incorporate into their theories the constitutional preferences of Justices Powell, Kennedy, and O'Connor. Thus, because federal courts in the late twentieth century have afforded and will afford more protection for abortion than welfare rights, significant doctrinal and strategic considerations seem to have compelled liberal constitutional theorists to adjust their theories to accommodate those troubling priorities.

A. *The Constitutional Status of Welfare and Abortion Rights Before Dandridge and Roe*

For over one hundred and fifty years, Americans found neither abortion nor welfare rights in their Constitution. This failure was probably less a consequence of any constitutional constraint than the result of there being no prominent political movement during the nineteenth or early twentieth centuries dedicated to either legal abortion or the right to be provided by the government with certain basic necessities. Influential American politicians and lawyers have always devised ingenious arguments purporting to demonstrate that the Constitution, properly interpreted, supports their preferred policies. This interpretive phenomenon explains why students of public law are professionally obligated at some point in their career to publish an article that quotes Alexis de Tocqueville's aphorism that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."¹¹⁴

¹¹¹ See *infra* notes 117, 120 and accompanying text.

¹¹² See *infra* notes 303-06 and accompanying text.

¹¹³ See *infra* notes 282-85 and accompanying text.

¹¹⁴ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Phillips Bradley ed., 1945). Even such matters as whether Congress was authorized to pass a protective tariff, which never became a judicial question, were resolved into a constitutional question. See 1 WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776-1854*, at 275 (1990); DANIEL FELLER, *THE PUBLIC LANDS IN JACKSONIAN POLITICS* 64, 89, 140, 161

Given the relative ease with which nineteenth century proponents of slavery and abolitionism found constitutional sanction for their preferred policies,¹¹⁵ little reason exists for doubting that a nineteenth century pro-choice or welfare rights movement would have reached the conclusion that the antebellum Constitution guaranteed legal abortion or the right to a survival income.

Americans could easily overlook the possible existence of reproductive or livelihood rights because neither abortion nor welfare is specifically mentioned in the constitutional text or was a clear concern of the constitutional Framers. Not surprisingly, persons who claim to be strict textualists or strict originalists¹¹⁶ maintain that no constitutional rights to abortion or welfare exist. "[T]he Constitution," Justice Scalia asserted, "says absolutely nothing about [abortion], and . . . the longstanding traditions of American society have permitted [abortion] to be legally proscribed."¹¹⁷ Henry Monaghan maintains that "[t]he relevant history simply cannot be read to support a claim that the Fourteenth Amendment was designed to require affirmative state responses to private claims to governmental services."¹¹⁸ Liberal constitutionalists concede this point. "The framers," Peter Edelman admits, "surely did not contemplate any constitutional right to any degree of redistribution, however modest."¹¹⁹ Tribe recognizes that "[t]he word 'privacy' is not in the text of the

(1984) (discussing how many southerners, who were opposed to the tariff, declared it unconstitutional).

¹¹⁵ See, e.g., SALMON PORTLAND CHASE & CHARLES DEXTER CLEVELAND, *ANTI-SLAVERY ADDRESSES OF 1844 AND 1845*, at 99 (1867) (promoting the Constitution as antislavery, they declared, "[a]gainst this influence, against these infractions of the Constitution . . . we solemnly protest." (emphasis in original)); 4 JOHN C. CALHOUN, *THE WORKS OF JOHN C. CALHOUN* 343-48 (Richard K. Cralle ed., 1861) (promoting the Constitution as proslavery).

¹¹⁶ What strict textualism and strict originalism entail is contestable. Liberal constitutional theorists reject claims that a strict originalist or a strict textualist would regard as constitutional only those particular rights specifically mentioned by name in the Constitution or specifically on the minds of the Framers when the Constitution was ratified. See DWORKIN, *supra* note 25, at 136-38. Still, liberal constitutional theorists do not label themselves as strict textualists.

¹¹⁷ *Planned Parenthood v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in part and dissenting in part); see also ROBERT H. BORK, *THE TEMPTING OF AMERICA* 111-16 (1990).

¹¹⁸ Henry Paul Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117, 128 (1978); see Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41, 86-89 (1973); Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 695-98 (1979).

¹¹⁹ Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 5 (1987).

Constitution,"¹²⁰ and that no tradition exists "protecting the *particular* right to choose an abortion."¹²¹

Still, originalists' obsessions with specific constitutional phrases and the precise intentions of the Framers do not trouble liberal constitutional theorists. They categorically reject assertions that all constitutional claims must be explicitly grounded in the constitutional text or history. That "the right to a decent livelihood . . . is not named in the Constitution," Charles Black confidently declares, "is not even close to dispositive of the question whether such a right can validly be derived in the American system."¹²² Justice William Brennan similarly condemned those who "requir[e] specific approval from history before protecting anything in the name of liberty."¹²³

Following Dworkin's pathbreaking discussion in *Taking Rights Seriously*, proponents of abortion and welfare rights believe that contemporary jurists should respect the general concepts of the Framers, but not their specific conceptions.¹²⁴ The Eighth Amendment in liberal constitutional theory, for example, forbids all cruel and unusual punishments, and not just those punishments that the persons responsible for the Constitution thought were cruel and unusual.¹²⁵ Being a contentious lot, liberal constitutional theorists dispute how general constitutional principles should be and what constitutional principles are best. Tribe and Dorf complain that Dworkin defines constitutional principles too abstractly¹²⁶ and that Bruce Ackerman fails to sufficiently respect the written constitutional text.¹²⁷ Cass Sunstein thinks Tribe

¹²⁰ TRIBE, *supra* note 25, at 83.

¹²¹ *Id.* at 100.

¹²² Black, Jr., *Reflections*, *supra* note 57, at 1108; *see id.* at 1111; Michelman, *Welfare Rights*, *supra* note 49, at 679-80 (discussing the basic similarities between the opposite definitions of protected rights).

¹²³ *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1992) (Brennan, J., dissenting); *see* Frank I. Michelman, *Super Liberal: Romance, Community and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 VA. L. REV. 1261, 1316-20 (1991) (discussing the division between Justice Scalia writing for the majority and Justice Brennan writing in dissent in *Michael H.* over the concept of tradition).

¹²⁴ *See* DWORKIN, *TAKING RIGHTS*, *supra* note 94, at 133-36; TRIBE & DORF, *supra* note 33, at 110 ("The Framers of our Constitution understood that this is not a perfect world, and thus, like it or not, judges must squarely face the task of deciding how to define our liberties abstractly."); Edelman, *supra* note 119, at 4 n.9.

¹²⁵ *See* DWORKIN, *supra* note 25, at 135-36.

¹²⁶ *See* TRIBE & DORF, *supra* note 33, at 17 ("[T]he enterprise that we are or should be about when we advance an argument in the Constitution's name must be more bounded than Dworkin's enterprise.").

¹²⁷ *See* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1223 (1995).

and Dorf's proposals are too formalistic,¹²⁸ and that Dworkin shows insufficient respect for elected officials.¹²⁹ James Fleming maintains that Cass Sunstein's emphasis on deliberative democracy "gives remarkably little attention to substantive liberties such as privacy and autonomy."¹³⁰ Nevertheless, Dworkin, Tribe, and other liberal constitutionalists agree that constitutional provisions should be understood as incorporating general principles and not specific practices, particularly when the constitutional provision in question speaks in general language.¹³¹

Liberal constitutional theorists do believe that history is relevant to constitutional analysis.¹³² What they reject is Justice Scalia's claim that courts may look only "to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."¹³³ Instead, liberal constitutional theorists think courts must first identify "an interest that has historically received [judicial] attention and protection," and then determine "whether the specific [claim] under consideration is close enough to the interests that [courts] already have protected to be deemed an aspect of 'liberty' as well."¹³⁴ History should "inform the meaning of the text," Sunstein writes, "especially if the pertinent constitutional goals can be described at a relatively high level of generality."¹³⁵ Thus, Tribe and other liberals think that because courts have traditionally protected the parent-child relationship, an adulterous father might have a constitutional right to visit his child even though the child's mother was married to another person when the child was conceived and born.¹³⁶

¹²⁸ See SUNSTEIN, *supra* note 26, at 105-06 (arguing that Tribe and Dorf's analysis of the Constitution's structure could work against their goal as well as work toward it, because their inquiry does not take sufficient account of discretion that is involved in making inferences from the Constitution).

¹²⁹ See Cass R. Sunstein, *Earl Warren is Dead*, THE NEW REPUBLIC, May 13, 1996, at 35.

¹³⁰ Fleming, *supra* note 95, at 217.

¹³¹ See Dworkin, *supra* note 25, at 135-36 (arguing that if the Framers had intended to codify their own convictions about the abstract ideas included in the Constitution, then they would have done so); DWORKIN, *supra* note 33, at 110.

¹³² See, e.g., SUNSTEIN, *supra* note 26, at 120 ("[A]ny conception of constitutional meaning should make our history relevant.").

¹³³ *Michael H. v. Gerald D.*, 491 U.S. 110, 128 n.6 (1989).

¹³⁴ *Id.* at 139, 142 (Brennan, J., dissenting); see TRIBE & DORF, *supra* note 33, at 102-12; DWORKIN, *EMPIRE*, *supra* note 80, at 46-53, 361-63.

¹³⁵ SUNSTEIN, *supra* note 26, at 121.

¹³⁶ See TRIBE & DORF, *supra* note 33, at 111; *Michael H.*, 491 U.S. at 136 (Brennan, J., dissenting).

1. *General Principles*

General principles do not explain the different status of abortion and welfare in liberal constitutional theory. The same general principles that liberals maintain justify abortion rights are commonly employed to justify welfare rights. Numerous liberal philosophers derive rights to basic necessities from the same governmental obligation to "treat everyone subject to its dominion with equal concern and respect" that Dworkin uses to derive abortion rights.¹³⁷ John Rawls claims that "citizens . . . viewing one another as free and equal"¹³⁸ would adopt "measures assuring all citizens . . . adequate all-purpose means to make intelligent and effective use of their liberties and opportunities."¹³⁹ These means, he emphasizes, include "[a] decent distribution of wealth," "[s]ociety as employer of last resort," and "[b]asic health care assured all citizens."¹⁴⁰ Michael Walzer, a more communitarian political liberal than Rawls, insists that the principles "underlying equality of membership" entail that "every political community must attend to the needs of its members as they collectively understand those needs."¹⁴¹ In the United States, Walzer believes, political equality requires that "the market . . . [be] pre-empted by the welfare state."¹⁴² Government in societies committed to our understanding of equal citizenship, he declares, must guarantee all citizens adequate legal, medical, and educational services. In Walzer's view, these "needed goods cannot be left to the whim, or distributed in the interest, of some powerful group of owners or practitioners."¹⁴³ Prominent liberal philosophers fear that a society marked by gross disparities of wealth will develop Jim Crow-like institutions based on wealth as "the affluent evacuate public spaces, retreating to privatized communities defined largely by income level."¹⁴⁴ Michael Sandel points out that, in addition to violating individual rights to welfare, policies that result in "severe inequality undermine[] freedom by corrupting the character of both

¹³⁷ DWORKIN, *supra* note 33, at 73.

¹³⁸ JOHN RAWLS, *POLITICAL LIBERALISM* xlv (1996).

¹³⁹ *Id.* at xlviii.

¹⁴⁰ *Id.* at lix. Cf. Michelman, *supra* note 46, at 14-15 (using Rawls to derive a constitutional right to basic necessities). Dworkin in 1977 urged constitutional theorists to consider how Rawls's work might be incorporated into their arguments. See DWORKIN, *TAKING RIGHTS*, *supra* note 94, at 150-83.

¹⁴¹ MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 84 (1983).

¹⁴² *Id.* at 89.

¹⁴³ *Id.* See generally Edelman, *supra* note 119, at 19-23 (noting the different ways in which liberal moral philosophers justify subsistence rights).

¹⁴⁴ SANDEL, *supra* note 43, at 331.

rich and poor and destroying the commonality necessary to self-government."¹⁴⁵

Rights to basic necessities may also be derived from the general principles that many feminists use when they defend abortion rights. Just as "[l]aws restricting access to abortion thereby place a real and substantial burden on women's ability to participate in society as equals,"¹⁴⁶ policies that restrict access to adequate food, shelter, medical care, and job opportunities place an even greater burden on the ability of poor people *to participate in society as equals*. Kenneth Karst's influential discussion, *Equal Citizenship Under the Fourteenth Amendment*, relies on this egalitarian principle, calling "for judicial intervention when economic inequalities make it impossible for a person to have 'a fully human existence.'"¹⁴⁷ The young, in particular, need basic necessities if they are to develop the capacities necessary to participate as equals in society. Thomas Grey points out that "in order to have a fair start children [must] be assured a decent minimum of food, clothing, shelter, and medical care."¹⁴⁸ "To be born poor," Mark Tushnet adds, "is to have severely restricted life chances, to run substantially greater risks of private and public violence, to have narrow educational options, and the like."¹⁴⁹ The New Jersey Supreme Court, for these reasons, declared unconstitutional state policies which forced students living in poor districts to attend substantially inferior schools.¹⁵⁰ "[I]t appears," the New Jersey Supreme Court asserted, "that the disadvantaged children will not be able to compete in, and contribute to, the society entered by the relatively advantaged children."¹⁵¹

Welfare is at least as strong a candidate as abortion for meeting the Supreme Court's test for fundamental freedoms, rights without which "neither liberty nor justice would exist."¹⁵² If, as Justice Benjamin Cardozo claimed in

¹⁴⁵ *Id.* at 330-33 (discussing the polarizing effects that arise from unequal economic status).

¹⁴⁶ *TRIBE*, *supra* note 25, at 105; see Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1107-09, 1014-17 (1984); Ginsburg, *Thoughts*, *supra* note 14, at 382-83.

¹⁴⁷ Karst, *supra* note 55, at 62; see Edelman, *supra* note 119, at 33-34; Loffredo, *supra* note 85, at 1327-28.

¹⁴⁸ Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877, 892 (1976).

¹⁴⁹ Tushnet, *supra* note 72, at 1094.

¹⁵⁰ See *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990) (Abbott II).

¹⁵¹ *Id.* at 372 (quoting *Abbott v. Burke*, 495 A.2d 376, 390 (N.J. 1985) (Abbott I)); see *id.* at 392-94; Michelman, *supra* note 46, at 58 ("[I]n a market-oriented and technological society justice demands minimum educational assurances.").

¹⁵² *Palko v. Connecticut*, 302 U.S. 319, 326 (1937) *overruled by* *Baton v. Maryland*, 395 U.S. 784 (1969).

Palko v. Connecticut, the Due Process Clause of the Fourteenth Amendment protects the “freedom of thought, and speech” because free speech “is the matrix, the indispensable condition, of nearly every other form of freedom,”¹⁵³ then from a liberal perspective, rights to livelihood should qualify for similar constitutional recognition. Numerous proponents of constitutional welfare rights point out that persons who have no material resources lack the means to exercise any constitutional freedom. Jacobus tenBroek observed that “[p]overty entails constitutional no less than social degradation. Financial, physical, and mental well-being,” he continued, “are thus prerequisites to constitutional rights.”¹⁵⁴ Poor persons are particularly vulnerable to social policies that require them to surrender privacy and other rights in order to secure the goods necessary for bare survival. “Welfare implies dependence,”¹⁵⁵ Reich and Sparer note with respect to laws that make consent to warrantless searches the price for receiving state aid. “And dependence,” they add, “means that people may more easily be induced to part with rights which they would ordinarily defend.”¹⁵⁶ Given the importance of basic necessities to a fully human life, some commentators conclude that welfare rights are the most important rights persons have. Charles Black “would like to look Cardozo straight in his gentle eyes and ask him whether the rights to freedom from gnawing hunger and from preventable sickness may form ‘the matrix, the indispensable condition, of nearly every other form’ of freedom.”¹⁵⁷

No general principles or unique institutional concerns explain why courts should protect constitutional rights to abortion but not constitutional rights to basic necessities. If, as Sunstein maintains, justices should strike down legislation that “turn[s] morally irrelevant characteristics . . . into systemic sources of social disadvantage,” then justices should strike down policies that *turn* poverty, presumably a *morally irrelevant characteristic* into a *systemic source of social disadvantage*.¹⁵⁸ Justice Jackson noted more than fifty years ago that “[t]he mere state of being without funds is a neutral fact—

¹⁵³ *Id.* at 326–27.

¹⁵⁴ TENBROEK, *supra* note 55, at 211.

¹⁵⁵ Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347, 1359 (1963).

¹⁵⁶ *Id.* at 1359; see Sparer, *Role*, *supra* note 54, at 367; Reich, *supra* note 155, at 1355; Joel F. Handler, *Editor's Introduction* to TENBROEK, *supra* note 55, at xvii (“[U]nless the indigent and unemployed have at least the bare minimum for existence, they are incapable of exercising constitutional rights.”) (citing *Rothstein v. Wyman*, 303 F. Supp. 339, 346–47 (S.D.N.Y. 1969)).

¹⁵⁷ Black, Jr., *Reflections*, *supra* note 57, at 1110.

¹⁵⁸ See *supra* notes 75–77 and accompanying text.

constitutionally an irrelevance, like race, creed or color.”¹⁵⁹

Judicial solicitude for welfare rights follows from liberal claims that courts should provide “special protection to those who have been deprived of their fair share of political influence.”¹⁶⁰ Feminists call on courts to declare unconstitutional bans on abortion because they believe such policies reflect the gross underrepresentation of women in American politics.¹⁶¹ “[P]olitical marginalization due to poverty,” proponents of welfare rights note, “is [also] an undemocratic phenomenon that ought to negate or at least undermine the usual presumption of constitutionality.”¹⁶² Peter Edelman asks, “[h]ow can anyone participate effectively in America’s democratic processes . . . without some minimum amount of education?” and continues, “[i]f education is fundamental to participation in a democratic society, surely a ‘bare minimum income’ is at least as fundamental.”¹⁶³ “To be hungry, afflicted, ill-educated, enervated, and demoralized by one’s material circumstances of life,” Michelman similarly points out, “is . . . to be personally disadvantaged in competitive politics.”¹⁶⁴

¹⁵⁹ *Edwards v. California*, 314 U.S. 160, 184–85 (1941) (Jackson, J., concurring); see TENBROEK, *supra* note 55, at 212–13 (analogizing the status of the poor to that of African Americans denounced in *Brown v. Board of Education*, 347 U.S. 483 (1954), and warning that the poor could also find the American system separate but unequal); Tushnet, *supra* note 72, at 1093–95 (discussing whether poverty should be considered a suspect classification).

¹⁶⁰ Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 715 (1985). This democratic process theory of judicial review is rooted in the famous footnote four of *United States v. Carolene Products*, which calls for “more searching judicial inquiry” when “prejudice against discrete and insular minorities . . . tends . . . to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.” *United States v. Carolene Products*, 304 U.S. 144, 152–53 n.4 (1938). For subsequent elaborations on that theme, see ELY, *THEORY*, *supra* note 26, *passim*; Calabresi, *supra* note 26, at 96, 118; LOUIS LUSKY, *BY WHAT RIGHT?: A COMMENTARY ON THE SUPREME COURT’S POWER TO REVISE THE CONSTITUTION* (1975); Ackerman, *supra*; GRABER, *supra* note 36, at 96–101, 114–15.

¹⁶¹ See RUTH COLKER, *ABORTION & DIALOGUE: PRO-CHOICE, PRO-LIFE AND AMERICAN LAW* xvii, 124, 161 (1992); Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 137, 151–52 (1989); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1309, 1324, 1327–28 (1991).

¹⁶² Loffredo, *supra* note 85, at 1286–87; see *id.* at 1293, 1305, 1323–24, 1367, 1374, 1379 (discussing how the Court has ignored the different ways poor people engage in political participation); Michelman, *supra* note 46, at 21–23 (noting a hostility by the 1969 Court towards de facto “discrimination against the poor”); Michelman, *Welfare Rights*, *supra* note 49, at 675; Ackerman, *supra* note 160, at 745.

¹⁶³ Edelman, *supra* note 119, at 33–34.

¹⁶⁴ Michelman, *Welfare Rights*, *supra* note 49, at 678; see *id.* at 675–78; Peter B. Edelman, *Mandated Minimum Income, Judge Posner, and the Destruction of the Rule of Law*, 55 ALB. L. REV. 633, 635–36 (1992) [hereinafter Edelman, *Minimum Income*];

Social science studies document the myriad ways in which economic inequalities get translated into political inequalities. The poor are less likely to vote and otherwise participate in politics than other Americans.¹⁶⁵ Indeed, poverty seems a greater handicap than gender in the political process. Women occasionally win seats in the Senate and the House of Representatives, but people on welfare lack the basic resources to run for local political offices. The poor are particularly disadvantaged because of their inability to make large political donations to friendly candidates.¹⁶⁶ No one should confuse Emily's List with the Chamber of Commerce. Still, pro-choice political groups contribute far more to political campaigns and, as a result, have greater influence on elections than those organizations interested in securing basic necessities for all citizens.¹⁶⁷ Given the overwhelming evidence of how politically ineffectual poor people are, a judiciary committed to protecting the rights of groups that lack political power would give at least as much scrutiny to economic policies harming the poor as that given to the reproductive policies that burden women.

a. *Positive and Negative Rights?*

The distinction between positive and negative rights provides the most plausible principled grounds for liberal claims that the Constitution protects abortion, but not welfare rights (or that judges should protect constitutional abortion rights, but not constitutional welfare rights). Constitutional rights are typically understood as rights to be free from hostile government interference and not as rights to demand friendly government support. Judge Richard Posner, a prominent libertarian, insisted that "[t]he men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them. The Fourteenth Amendment sought to protect Americans from oppression by state government, not to secure them basic government services."¹⁶⁸ Judges and professors who think the

Edelman, *supra* note 119, at 2, 34; Loffredo, *supra* note 85, at 1327-28.

¹⁶⁵ See RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES? 13-36 (1980); SIDNEY VERBA ET AL., VOICE AND EQUALITY 186-227 (1995).

¹⁶⁶ See VERBA ET AL., *supra* note 165, at 187-204.

¹⁶⁷ See Elsa Brenner, *The Voice of Women in Politics*, N.Y. TIMES, Sept. 15, 1996, 13WC, at 1; see also GRABER, *supra* note 36, at 131-32.

¹⁶⁸ Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983); see David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 890 (1986); see also Tilden v. Hayward, No. 11297, 1990 Del. Ch. LEXIS 140, at *43-48 (New Castle Sept. 10, 1990) (rejecting claim that state family services agency is required to assist in finding housing for those trying to reunify their families).

Constitution "is a charter of negative rather than positive liberties"¹⁶⁹ may believe that government cannot constitutionally interfere when women seek to terminate their pregnancies,¹⁷⁰ but they agree that a Constitution of negative rights does not compel state officials to provide all citizens with basic necessities.

Even if positive constitutional rights exist, the federal judiciary may be authorized to protect only negative constitutional rights. Constitutional and institutional barriers unique to welfare rights might bar judicial solicitude for the positive constitutional rights of poor people. "The enforcement of affirmative duties upon the Federal government," David Currie asserts, "would pose particular problems: the executive cannot be ordered to spend money that Congress has not appropriated, and Congress cannot be ordered to make an appropriation."¹⁷¹ Currie further notes that constitutional welfare rights must be enforced, if enforced at all, by elected officials. Courts cannot guarantee welfare rights, in his opinion, because no judicially manageable standards exist for determining how to implement any constitutional right to basic necessities.¹⁷² Remarkably, some proponents of welfare rights concede that constitutional rights to basic necessities cannot be fully implemented by the judiciary. Michelman believes courts are authorized to expand and restructure existing welfare programs.¹⁷³ He confesses, however, that because of "judicially inappropriate questions of definition or problems of enforcement,"¹⁷⁴ "minimum protection is likely to demand remedies which cannot be directly embodied in judicial decrees."¹⁷⁵

Michelman's admission of judicial incompetence in welfare cases is surprising. Liberal constitutional theorists writing on other constitutional subjects largely abandoned those traditional limitations on judicial remedies that might inhibit a court from recognizing welfare rights. Courts cannot by themselves win the war on poverty.¹⁷⁶ Nonetheless, the problem of developing

¹⁶⁹ *Jackson*, 715 F.2d at 1203 (citation omitted).

¹⁷⁰ See RICHARD A. POSNER, *SEX AND REASON* 324-50 (1992).

¹⁷¹ Currie, *supra* note 168, at 889 n.129.

¹⁷² See *id.* at 889.

¹⁷³ See Michelman, *Welfare Rights*, *supra* note 49, at 684-85.

¹⁷⁴ *Id.* at 679.

¹⁷⁵ Michelman, *supra* note 46, at 39; see Michelman, *Welfare Rights*, *supra* note 49, at 679, 684-85. Declarations of positive rights in European constitutions tend not to be judicially enforceable. See Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 527-29 (1992) (comparing the constitutional protection of welfare rights in the United States with the constitutional provisions in other countries).

¹⁷⁶ See Black, Jr., *Reflections*, *supra* note 57, at 1107 ("The courts probably cannot do very much herein."); Michelman, *supra* note 46, at 39; Michelman, *Welfare Rights*, *supra* note 49, at 684-85.

judicially manageable standards in welfare cases seems no more difficult than the problem of developing judicially manageable standards in abortion cases and other areas of constitutional law where liberal constitutional theorists have urged novel judicial action. Many welfare rights cases that go unmentioned upon in liberal constitutional theory only require conventional judicial remedies. The petitioners in *Shapiro*¹⁷⁷ insisted that they had a constitutional right to receive the same welfare benefits that the state paid to established residents. The petitioners in *Dandridge*¹⁷⁸ claimed that welfare laws should not discriminate against large families. Determining what goods people need to survive is, of course, more complicated than adding people to the welfare rolls. A constitutional requirement for the provision of basic necessities, however, would present no more *judicially inappropriate questions of definition* than the present constitutional law of abortion. If courts deciding reproductive rights cases can develop judicially manageable standards for determining when a fetus is viable¹⁷⁹ and when health reasons require abortions to be done in hospitals,¹⁸⁰ then courts in welfare cases would seem to have the capacity necessary to determine what a survival income is.¹⁸¹ Certainly the factors necessary to determine basic human needs are no more intricate than the factors progressive activists for the past thirty years have asked courts to consider when reorganizing school systems, state hospitals, prisons, and other public institutions.¹⁸² Writing in 1977, Donald Horowitz observed that:

In just the past few years, . . . [f]ederal district courts have laid down elaborate standards for food handling, hospital operations, recreation facilities, inmate employment and education, sanitation, and laundry, painting, lighting, plumbing, and renovation in some prisons; they have ordered other prisons closed. Courts have established equally comprehensive programs of care and treatment for the mentally ill confined in hospitals. They have ordered the equalization of school expenditures on teachers' salaries, established hearing procedures for public school discipline cases, decided that bilingual education

¹⁷⁷ *Shapiro v. Thompson*, 394 U.S. 618 (1969) *overruled in part by* *Edelman v. Jordan*, 415 U.S. 651 (1974).

¹⁷⁸ *Dandridge v. Williams*, 397 U.S. 471 (1970).

¹⁷⁹ See *Colautti v. Franklin*, 439 U.S. 379 (1979); *Roe v. Wade*, 410 U.S. 113, 160-64 (1973).

¹⁸⁰ See *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983) *overruled by* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

¹⁸¹ See Tushnet, *supra* note 72, at 1090, 1095-96; Edelman, *supra* note 119, at 50-52 (suggesting one way for judges to calculate a survival income).

¹⁸² See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

must be provided for Mexican-American children, and suspended the use by school boards of the National Teacher Examination and of comparable tests for school supervisors. They have eliminated a high school diploma as a requirement for a fireman's job. They have enjoined the construction of roads and bridges on environmental grounds and suspended performance requirements for automobile tires and air bags. They have told the Farmers Home Administration to restore a disaster loan program, the Forest Service to stop the clear-cutting of timber, and the Corps of Engineers to maintain the nation's non-navigable waters.¹⁸³

Unless liberals are prepared to recant their support for such judicial decisions (many of which were decided on constitutional grounds), proponents of *Roe* should be deemed to have constructively abandoned any claim that courts somehow lack the competence necessary to determine the scope and nature of the right to basic necessities.¹⁸⁴

Liberals who claim that poor women have a judicially enforceable constitutional right to a state funded abortion¹⁸⁵ are not well positioned to deny that poor women (and men) have a judicially enforceable constitutional right to state funded basic necessities. Claims that states must pay for abortion only because they are already paying for childbirth fail for several reasons to cordon off abortion rights from welfare rights. Critics of Supreme Court decisions sustaining state bans on abortion funding¹⁸⁶ recognize that courts do have the power to order a legislature to spend additional funds when expanding the scope of an existing welfare program is necessary to vindicate constitutional rights. Liberals spent most of the 1960s, 1970s, and 1980s making constitutional claims that, when accepted, required substantial legislative funding.¹⁸⁷ No reason exists why welfare should be singled out as the one area of constitutional law where, for institutional considerations, liberal constitutional theorists must refrain from asking courts to order financing for constitutional rights. Legislatures may not obey judicial orders to spend additional funds, but

¹⁸³ DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 4-5 (1977).

¹⁸⁴ See generally Edelman, *Minimum Income*, *supra* note 164, at 638 ("[I]f there is a fundamental right to life, liberty, and property, it is not shocking to characterize the right to receive enough income to subsist in contemporary America as a positive right.").

¹⁸⁵ See *supra* note 35 and accompanying text.

¹⁸⁶ See *Harris v. McCrae*, 448 U.S. 297 (1980) (holding that the state is not required to provide funding for abortions, even for those that are deemed medically necessary); *Maher v. Roe*, 432 U.S. 464 (1977) (upholding a Connecticut regulation that requires a certificate of medical necessity before the state will assist in paying for the abortion).

¹⁸⁷ See HOROWITZ, *supra* note 183, at 4-5 (quoted above); GREENBERG, *supra* note 52, at 30 (noting that "commutative welfare rights decisions such as the man in the house, residency and fair hearing decisions had foreseeable distributive effects").

non-compliance is a potential problem whenever the judiciary makes any controversial decision.¹⁸⁸

Any competent liberal law professor living in a welfare state will have no difficulty finding an existing state program that can be used to justify imposing a constitutional obligation on elected officials to insure that all citizens living in their jurisdiction obtain at least a survival income (or certain basic necessities). Existing welfare policies are one place to start. All states provide some assistance to some needy people. The Equal Protection Clause may, thus, be violated when other equally needy persons are excluded from such programs for reasons other than their need.¹⁸⁹ States also provide an extensive array of welfare benefits to some affluent citizens, benefits that are typically provided on more generous terms than the benefits provided to poorer persons.¹⁹⁰ Hence, on the assumption that states will not abandon all public assistance programs (for rich or poor people),¹⁹¹ those who oppose sustaining state bans on abortion funding should recognize that the present welfare system has created constitutional obligations to provide basic necessities to all needy people.

More generally, following a line of argument first laid down by the legal realist Robert Hale, liberal theorists have firmly rejected the jurisprudential foundations underlying the distinction between positive and negative rights. "In the post-New Deal regime," Louis Seidman and Mark Tushnet state, "the Court can no longer talk convincingly of the distinction between [state] acts and omissions, or of a natural and preexisting private sphere not constituted by public decisions."¹⁹² States are responsible for all economic inequalities

¹⁸⁸ See GERALD N. ROSENBERG, *THE HOLLOW HOPE* (1991). Many school districts did not obey judicial bans on school prayer, even though compliance did not require any public expenditures. See KENNETH M. DOLBEARE & PHILIP E. HAMMOND, *THE SCHOOL PRAYER DECISIONS* (1971). Indeed, elected officials have been at least as willing to implement liberal welfare rights decisions as other liberal judicial rulings not requiring public spending. See *infra* notes 323-33 and accompanying text.

¹⁸⁹ See *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (invalidating federal regulations that conditioned receipt of food stamps on proof that the beneficiary resided in household where all occupants were related); *United States Dep't of Agric. v. Murry*, 413 U.S. 508 (1973) (invalidating federal regulations that excluded from the food stamp program any household that had a member who, although 18 years or older, was claimed as a dependent of someone not living in that household); Tribe, *supra* note 55, at 1080, 1084; TRIBE, *supra* note 102, at 1646.

¹⁹⁰ See LINDA GORDON, *PITIED BUT NOT ENTITLED 2* (1994) (listing a number of state and federal programs that could be perceived as welfare to the affluent); see TENBROEK, *supra* note 55, at 3-4.

¹⁹¹ See Currie, *supra* note 168, at 882.

¹⁹² LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF* 68 (1996); see *id.* at 26-31, 65-68; J.M. Balkin, *Some Realism About Pluralism: Legal Realist*

because those inequalities are created and exacerbated in part by state policy.¹⁹³ States create jobs directly. States make policies that determine how private parties create jobs. State monetary policies influence the value of the wages that workers receive, and state educational policies affect the distribution of skills necessary for success in the contemporary economic marketplace.¹⁹⁴ As a result, state policies are partly responsible for unemployment, underemployment, and other causes of poverty. As Edelman notes, "[t]he state has helped put people in a position of being unable to find work and unable to perform available work."¹⁹⁵ Many legal realists insist that states are implicated in any economic inequality. Reich and others maintain that "property is created by law" and "owes its origin and continuance to laws supported by the people as a whole."¹⁹⁶ "[W]e learned long ago," the young Laurence Tribe explained, "that, even when government 'merely' establishes and enforces rules of contract, property, and corporate law, it *is* in fact acting affirmatively to bring about a discernible social distribution of benefits and burdens."¹⁹⁷ Persons who treat economic inequality as a natural phenomenon rather than as a consequence of state policy, Sunstein maintains, commit the deadly sin of "status quo neutrality."¹⁹⁸ Hence, given that government is already acting to enrich many citizens, a liberal interpretation of the Fourteenth Amendment should, at a minimum, require states to ensure that no one remains utterly impoverished.¹⁹⁹

Approaches to the First Amendment, 1990 DUKE L.J. 375, 415-17 (1990) (arguing that although individuals can be accurately described to have free choice, that free choice is bounded by the legal regime that assures its existence); SUNSTEIN, *supra* note 26, at 50-60 (discussing the judicial activism that occurred after the New Deal and how the argument for laissez-faire failed).

¹⁹³ See Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943) (discussing how government regulations can circumscribe the choices available for an individual to meet his economic needs).

¹⁹⁴ See Edelman, *supra* note 119, at 45-48 ("[A] whole series of governmental policies have contributed to the intensification of poverty. Governmental decisions that have shaped the location of people in relation to those jobs are a good example.").

¹⁹⁵ *Id.* at 48.

¹⁹⁶ Reich, *New Property*, *supra* note 19, at 778; see Edelman, *supra* note 119, at 43-45 ("Our entire system of legal rules shapes wealth and poverty in the United States."); Frank I. Michelman, *Property and the Politics of Distrust: Liberties, Fair Values, and Constitutional Method*, 59 U. CHI. L. REV. 91, 98 (1992) [hereinafter, Michelman, *Property*]; Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1335 (1987); SUNSTEIN, *supra* note 26, at 3-6, 50-60, 69-71.

¹⁹⁷ Tribe, *supra* note 55, at 1085; see *id.* at 1085-89.

¹⁹⁸ See SUNSTEIN, *supra* note 26, at 70.

¹⁹⁹ Proponents of welfare rights do not demand absolute economic equality. Rather, they

In short, liberal constitutional theorists maintain that the distinction between positive and negative constitutional rights is "mistaken" or "unhelpful,"²⁰⁰ particularly in a welfare state. They regard "the question of liberty [as] inseparable from the question of distribution."²⁰¹ The central issue that welfare rights cases present is, thus, not whether government should provide some special benefit to the poor. Rather, because government in the late twentieth century routinely provides a wide array of jobs, financial benefits, and other services to most citizens, the issue is whether government may nevertheless fail to guarantee basic necessities to some citizens. Proponents of welfare rights maintain that such refusals violate constitutional rights to equal concern and respect. "If government policy has created conditions which have helped some to prosper mightily and left others in a state of total and absolute deprivation," Edelman writes, "it has denied the latter the equal protection of the laws, and steps must be taken to remedy that denial."²⁰²

b. *A Caveat*

These arguments from general principles hardly clinch the case for welfare rights. At most, they demonstrate that liberal constitutional theorists who

endorse the claim in *Rodriguez* that when government provides an important benefit like education to some people, government must not absolutely deprive any citizen of a like benefit. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 25 (1973). "[A] duty to extend protection against certain hazards," Michelman points out, "need not entail or suggest any 'equalization' of treatment" Michelman, *supra* note 46, at 11; see *id.* at 18, 35, 42, 58-59; Edelman, *supra* note 119, at 33, 48-52; *TRIBE*, *supra* note 102, at 1655, 1671-72; *Tribe*, *supra* note 55, at 1082-83. But see Michelman, *supra* note 46, at 58 (suggesting with respect to education that "the minimum is significantly a function of the maximum and to that extent calls for equalization").

²⁰⁰ SUNSTEIN, *supra* note 26, at 70; see also Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 304-07 (1991) (noting that any positive right can be translated into a negative right).

²⁰¹ Michelman, *Property*, *supra* note 196, at 91 n.*; see *id.* at 96-99.

²⁰² Edelman, *supra* note 119, at 25. The young *Tribe* similarly claimed that:

[W]hen the regimes of private and public law combine to bring about a situation in which some can afford elaborate private educations and advanced medical care while others are relegated to ill-equipped classrooms and untreated disease, an individual who suffers grievous harm from the resulting distribution of benefits and burdens has been wronged by government and need not preface a claim of constitutional violation with an allegation that government has established specific public programs from which that individual has been arbitrarily excluded or expelled.

Tribe, *supra* note 55, at 1088 (citation omitted).

already believe that persons have a fundamental human right to basic necessities should also think that persons have a fundamental constitutional right to basic necessities. Jurists who reject the interpretive principles central to liberal constitutional theory frequently conclude that neither abortion nor welfare are fundamental constitutional rights.²⁰³ Moreover, commentators who accept liberal constitutional principles may nevertheless reject welfare rights, abortion rights, or both. Libertarians who “fear[] . . . the implications of a coerced redistribution for the economic well-being of the society and the freedom of its citizens”²⁰⁴ do not think a government that treated all citizens with equal concern and respect would guarantee to all persons certain basic necessities.²⁰⁵ Persons who are convinced that unborn genetic humans have a right to life may insist that bans on abortion follow from the principle of equal concern and respect or the government obligation to make sure that all citizens have the capacities necessary to participate in society as equals.²⁰⁶

The point is simply that liberals who believe that abortion is a fundamental right and liberals who believe that welfare is a fundamental right derive their support from the same general principles. Hence, liberal constitutional theorists who maintain that the federal judiciary should protect abortion but not welfare cannot claim that the Constitution protects the general principle underlying abortion, but not welfare. Dworkin, Tribe, and other pro-choice constitutionalists must either reject past liberal claims that welfare rights can be deduced from those constitutional principles, reject liberal understandings of the role of the federal judiciary, or believe that history has decisively refuted welfare but not abortion rights.

2. History

No reason exists for thinking that constitutional history, even broadly construed, discredits welfare rights more than abortion rights. Neither abortion nor welfare have strong specific roots in the American constitutional tradition.²⁰⁷ Liberal constitutional theorists, however, “look[] to history and tradition, not to enshrine practices familiar to the constitutional framers, but to illuminate the *principles* that the framers held and sought to embody in the constitutional text.”²⁰⁸ From this perspective, American political and legal

²⁰³ See *supra* notes 116–17 and accompanying text.

²⁰⁴ Winter, *supra* note 118, at 62.

²⁰⁵ *Id.* at 61–62.

²⁰⁶ JOHN T. NOONAN, JR., A PRIVATE CHOICE 178–88 (1979).

²⁰⁷ See *supra* notes 119–24 and accompanying text.

²⁰⁸ Peggy Cooper Davis, *Neglected Stories and the Lawfulness of Roe v. Wade*, 28 HARV. C.R.-C.L. L. REV. 299, 303 (1993).

practices offer more generalized support for abortion rights than conservative originalists suspect.²⁰⁹ Still, analogous political and legal practices offer at least the same degree of generalized support for welfare rights. Indeed, American political and legal practices from the New Deal to the Great Society provide far greater and more particularized foundations for constitutional rights to basic necessities than for any constitutional right to terminate a pregnancy. Leading political actors during the mid-twentieth century spoke of the "freedom from want,"²¹⁰ the United States signed international agreements declaring welfare a fundamental human right,²¹¹ and Supreme Court opinions rejected the idea of welfare as "mere charity."²¹² The public rhetoric of privacy in 1970, by comparison, was largely confined to rights associated with marital sexuality.

The persons responsible for the post-Civil War Constitution did not believe abortion or welfare were fundamental rights, but they endorsed certain basic principles from which abortion or welfare rights might be derived. The Framers of the Thirteenth and Fourteenth Amendments specifically intended to protect what they believed were the fundamental rights of families and the poor. "[A]nti-slavery advocates," Peggy Cooper Davis's fine study indicates, "were explicit in their determination that all Americans would be protected against the family violations that characterized slavery."²¹³ Senator Henry Wilson of Massachusetts spoke for many of his peers when he asserted that "the hallowed family relations of husband and wife, parent and child, will be protected by the [proposed Thirteenth Amendment]."²¹⁴ Leading Reconstruction Republicans similarly insisted that the Equal Protection Clause of the Fourteenth Amendment would outlaw both wealth and race classifications. "By the equality of man," Wilson informed his fellow Senators, "we mean that the poorest man, be he black or white . . . is as much entitled to the protection of the law as the richest and proudest man."²¹⁵ Wilson and other members of the Reconstruction

²⁰⁹ See *infra* notes 213–46 and accompanying text.

²¹⁰ Franklin D. Roosevelt, The Annual Message to Congress, January 6, 1941, in 9 THE PUBLIC PAPERS OF FRANKLIN D. ROOSEVELT 672 (compiled and collated by Samuel J. Rosenman 1941) [hereinafter ROOSEVELT PAPERS].

²¹¹ See *Universal Declaration of Human Rights*, in HUMAN RIGHTS (A. I. Melden ed., 1970).

²¹² *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970) ("Public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'").

²¹³ Davis, *supra* note 208, at 309.

²¹⁴ CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864). For similar comments, see Davis, *supra* note 208, at 379–86; Peggy C. Davis, *Law, Science, and History: Reflections upon In the Best Interests of the Child*, 86 MICH. L. REV. 1096, 1113–18 (1988).

²¹⁵ CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866). For similar comments, see GRABER, *supra* note 36, at 81–82.

Congress were primarily committed to guaranteeing poor persons and persons of color the same rights to marriage, family, property, and alienation of labor that were enjoyed by affluent white citizens in the United States.²¹⁶ Still, to the extent that liberals interpret the above general references to family rights as supporting the right to terminate a pregnancy,²¹⁷ liberals should interpret the above general references to the rights of the poor as supporting rights to basic subsistence. Abortion is certainly no more privileged than welfare by the words the Framers of the post-Civil War Constitution chose to express their intentions. If anything, interpreting the phrase "equal protection" as encompassing welfare rights seem more natural English usage than interpreting the phrases "equal protection" or "due process" as encompassing abortion rights.

a. *Tradition*

Most proponents of *Roe* place more emphasis on American political practices than on statements made on the floor of the 38th and 39th Congresses. Liberal constitutional theorists highlight early nineteenth century state cases that they think demonstrate that American law at the time of the Constitution's ratification did not prohibit abortion until quickening.²¹⁸ "The privacy right *Roe* recognized," Reva Siegel and other pro-choice constitutionalists proclaim, "protects a liberty available to women at common law."²¹⁹ Antebellum Americans, however, did not think this legal permission to terminate a pregnancy was grounded in a more fundamental freedom.²²⁰ When every state

²¹⁶ See HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875*, at 317, 321, 393 (1982); ERIC FONER, *RECONSTRUCTION: AMERICAN'S UNFINISHED REVOLUTION 1863-1877*, at 28-29 (1988); GRABER, *supra* note 36, at 80.

²¹⁷ See Davis, *supra* note 208, at 392-94. Davis stated, "[t]he promise of emancipation and Reconstruction was more than freedom of ownership by a master. It was freedom to live as morally responsible agents, able to mark the social fabric." *Id.* at 394.

²¹⁸ See Brief of 250 American Historians as Amici Curiae in Support of Planned Parenthood of Southeastern Pennsylvania at 5, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902) [hereinafter *Historians' Brief*]; *Roe v. Wade*, 410 U.S. 113, 132-41 (1973); JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900*, at 3-6 (1978); Samuel W. Buell, *Criminal Abortion Revisited*, 66 N.Y.U. L. REV. 1774, 1780-82 (1991).

²¹⁹ Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 278 n.64 (1992); see *Roe*, 410 U.S. at 140; Siegel, *supra*, at 281-82; DWORKIN, *supra* note 25, at 111-12; TRIBE, *supra* note 25, at 28-29.

²²⁰ The *Brief of 250 American Historians in Casey* asserts that "abortion was tolerated" before the Civil War, but presents no evidence that anyone thought abortion was a

moved to ban abortion at the time the Fourteenth Amendment was ratified, no one asserted that any fundamental human or constitutional right was being violated.²²¹

Twentieth century policies towards human reproduction reflect this ambiguous status of abortion in American political consciousness. Legal prohibitions on the books of every state never accurately described actual political practice in the United States. While American black letter law before *Roe* was anti-abortion, women who were willing to run the medical risks were usually permitted to terminate their pregnancies without legal complications. As a result of innumerable official decisions not to interfere with competent abortionists, increasing numbers of affluent white women probably enjoyed a de facto right to a safe abortion on demand during the years following the end of the Second World War.²²² Nevertheless, few Americans before *Roe* openly professed their belief that reproductive choice was a fundamental human liberty. The claim that "abortion was a woman's *right*," Kristin Luker points out, was not made "[p]rior to 1967."²²³

A significant number of prominent Americans during the 1960s were, however, claiming that persons had a fundamental right to basic necessities. To the extent that the New Deal altered the American constitutional universe, the "constitutional triumph of the activist welfare state"²²⁴ strongly supports various subsistence rights. New Dealers self-consciously understood themselves as developing policies that would provide all Americans with the necessities of life. Franklin Roosevelt maintained that "freedom from want" was one of "four essential freedoms," and insisted that among "the basic things expected by our people of their political and economic systems" were "jobs for those who can work" and "security for those who need it."²²⁵ The Supreme Court in 1941

fundamental human or constitutional right. See *Historians' Brief*, *supra* note 218, at 1. Nineteenth century courts explicitly affirmed legislative power to alter the common law's permissive attitude towards early abortion. "If the good of society requires that the evil [of abortion] should be suppressed by penal inflictions," one state judiciary maintained, "it is far better that it should be done by legislative enactments than that courts should, by judicial construction, extend the penal code or multiply the objects of criminal punishment." *State v. Cooper*, 2 Zab. 52, 58 (N.J. 1849); see MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 163 (1985).

²²¹ See MOHR, *supra* note 218, at 200–25.

²²² For a detailed study of the differences before *Roe* between abortion law in books and abortion law in action, see GRABER, *supra* note 36, at 39–64; LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE AND LAW IN THE UNITED STATES, 1867–1973* (1997).

²²³ KRISTIN LUKER, *ABORTION & THE POLITICS OF MOTHERHOOD* 92 (1984).

²²⁴ ACKERMAN, *supra* note 26, at 40.

²²⁵ Roosevelt, *supra* note 210, at 671–72; see Franklin D. Roosevelt, New York State

pointed out that "the theory of the Elizabethan poor laws no longer fits the facts."²²⁶ Under modern conditions, the Court declared, "the duty to share ['the task of providing assistance to the needy'] has been recognized not only by state government, but by the federal government as well."²²⁷ The United States officially acknowledged welfare rights seven years later when signing the United Nations Universal Declaration of Human Rights.²²⁸ Article 25 of that document put all signatory nations on record as recognizing that:

[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."²²⁹

Nineteenth century political practice also offers some support for welfare rights. Historians recognize that "American public welfare has a very old history."²³⁰ Most states statutorily provided some sustenance, albeit a meager one, for the poor. Significantly, these benefits may have been understood as matters of right rather than legislative grace. The first legal treatise published in the United States declared that "[e]ach town . . . [is] obliged to take care of and

Takes the Lead in the Relief of the Unemployed. A Message Recommending Creation of Relief Administration. August 28, 1931, in 1 ROOSEVELT PAPERS, *supra* note 210, at 459 ("[A]id" to "unfortunate citizens . . . must be extended by government, not as a matter of charity, but as a matter of social duty."); see also SUNSTEIN, *supra* note 26, at 60.

²²⁶ Edwards v. California, 314 U.S. 160, 174-75 (1941).

²²⁷ *Id.*

²²⁸ *Universal Declaration of Human Rights*, G.A. Res. 71, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

²²⁹ *Id.* art. 25. The Universal Declaration of Human Rights also declared that persons had rights "to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment," *id.* art. 23.1, "to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection," *id.* art. 23.3, "to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay," *id.* art. 24, and "to [free] education." *Id.* art. 26. The Universal Declaration of Human Rights does not specifically mention abortion or birth control. That document does, however, assert that "[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence," *id.* art. 12, and that "[m]en and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family." *Id.* art. 16. Thus, while the United States explicitly acknowledged rights to basic necessities when signing the Universal Declaration, this act merely recognized certain general principles from which abortion rights might be deduced.

²³⁰ MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE* xiii (1986).

maintain their own poor. . . . The selectmen are bound to provide necessities for all the inhabitants of the town, who are incapable of supporting themselves."²³¹ Jesse Root, a member of the Connecticut bench during the early nineteenth century, similarly observed that, "[i]t is the duty of every government to protect and to provide for the poor."²³²

Indeed, Biblical injunctions, common law understandings, and American practice when the Constitution was ratified support welfare rights at least to the degree that Justice Blackmun's similar analysis in *Roe* supports abortion rights.²³³ "From the beginning of recorded time," Walter Trattner's influential history of social welfare policies observes, "people have shown a concern for others; individually and collectively they have tried to deal with insecurity and human need and to help those fellow men found unable to meet the minimum requirements of society."²³⁴ Western religious traditions emphasize communal obligations to provide for the poor. As Trattner notes, Judaism and Christianity "assume[] that need arose as a result of misfortune for which society, in an act of justice, not charity or mercy, had to assume responsibility. . . . [T]he needy,

²³¹ 1 ZEPHANIAH SWIFT, *A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT* 119 (1972); see *Moore v. Ganim*, 660 A.2d 742, 796 (Conn. 1995) (Berdon, J., dissenting); *Newland v. Child*, 254 P.2d 1066, 1070 (Idaho 1953) ("The granting of aid to its needy aged is a well recognized obligation of the state."); *People ex rel. Wayland v. Allied Hotels Corp.*, 46 N.E.2d 48, 49 (Ill. 1943) ("Since 1874 it has been the duty of towns to relieve and support all lawfully resident paupers."); *Bullock v. Whiteman*, 865 P.2d 197, 202 (Kan. 1993) ("universally recognized state duty"); *Butte Community Union v. Lewis*, 745 P.2d 1128, 1130 (Mont. 1987) (noting that the state judiciary and constitution have historically recognized that "[t]he care of the state for its dependent citizens is . . . a measure of its civilization"); *County of Merrimack v. Derry*, 219 A.2d 703, 705 (N.H. 1966) ("[P]rovision for relief and support at public expense of persons unable to support themselves has long been part of our public law."); *Williams v. Dep't of Human Servs.*, 561 A.2d 244, 248 (N.J. 1989) ("Relief of the poor has been considered an obligation of government since the organization of our State."); *Jiggetts v. Grinker*, 553 N.E.2d 570, 575 (N.Y. 1990) (noting "that New York has a long history of protecting children in the home"); *Sioux Valley Hosp. Assoc. v. Bryan*, 399 N.W.2d 352, 354 (S.D. 1987) ("Every county has a duty to relieve and support poor and indigent persons who reside within its boundaries." (citation omitted)); Sarah Ramsey & Daan Braveman, *"Let Them Starve": Government's Obligation to Children in Poverty*, 68 TEMP. L. REV. 1607, 1631 (1995) ("Each state has a longstanding tradition of providing special protection for children."); Daan Braveman, *Children, Poverty and State Constitutions*, 38 EMORY L.J. 577, 606 (1989).

²³² JESSE ROOT, *Observations upon the government and the laws of Connecticut*, in 1 ROOT'S REPORTS xxviii (1898).

²³³ See *Roe v. Wade*, 410 U.S. 113, 129-41 (1973).

²³⁴ WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* viii-ix (1974).

had a right to assistance, and those better off had a duty to provide it.”²³⁵ Trattner further points out that although Elizabethan Poor Laws were harsh in many respects, common law policy towards the poor rested on the “assumption that the state had a responsibility to supplement ordinary efforts to relieve want and suffering and to insure the maintenance of life.”²³⁶ Finally, Trattner asserts, American settlers accepted their inherited obligation to provide for the less fortunate among them. “[C]olonial assemblies,” he states, “quickly acknowledged public responsibility for those unable to care for themselves, making the taxpayers of each locality responsible for their support.”²³⁷ As a result, when the Constitution was ratified, Americans seemed “more interested in providing good treatment for the poor than they were in economizing on welfare costs.”²³⁸

Prominent constitutional Framers recognized this societal obligation to ensure that all persons had a meaningful opportunity to acquire basic necessities. “The Revolutionaries,” Drew McCoy’s study of Jeffersonian political economy documents, “believed that every man . . . was entitled to autonomous control of the resources that were absolutely necessary to survive.”²³⁹ Leading antebellum American politicians sought to realize this welfare right by advocating and adopting policies that guaranteed a homestead to all enterprising citizens.²⁴⁰ John Adams insisted that republican governments made “the acquisition of land easy to every member of society.”²⁴¹ Jefferson informed Madison that:

[W]herever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. . . . If, for the encouragement of industry, we allow it to be appropriated, we must take care that other employment be furnished to those excluded from the appropriation. If we do not the fundamental right to labour the earth returns to the unemployed. . . . [I]t is not too soon to provide by every possible means that as few as possible shall be without a little portion of

²³⁵ *Id.* at 4; *see id.* at 2–4.

²³⁶ *Id.* at 11; *see id.* at 6–12.

²³⁷ *Id.* at 17; *see id.* at 15–19.

²³⁸ *Id.* at 26.

²³⁹ DREW R. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* 68 (1980).

²⁴⁰ *See id.* at 51, 62, 67–68, 126–28, 152, 186, 189, 194, 236–37, 248–49; HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 13, 21, 25–26, 43–44 (1993).

²⁴¹ Letter from John Adams to James Sullivan, May 26, 1776, *quoted in* MCCOY, *supra* note 239, at 68.

land.²⁴²

From Jefferson's perspective, the Louisiana Purchase was best conceptualized as an antipoverty program that secured to future generations the land necessary to earn a living.²⁴³

There are far more "depressing" readings from a liberal perspective of the American social welfare tradition.²⁴⁴ Nonetheless, little doubt exists that two hundred and fifty historians committed to welfare rights could easily produce an amicus brief as persuasive as the brief that two hundred and fifty historians produced in *Casey* on behalf of abortion rights.²⁴⁵ That welfare brief would probably provide a more optimistic interpretation of American policies towards the poor than scholarship warranted, but the same is probably true of the briefs historians have produced in support of abortion.²⁴⁶ That welfare brief would also no more convince proponents of laissez-faire that the Constitution protects welfare rights than the historians' briefs in *Casey* and *Webster* convinced pro-life advocates. Nevertheless, if Tribe, Dworkin, and other pro-choice constitutionalists regard the historical briefs produced in abortion cases as providing adequate grounding for *Roe*, then welfare rights advocates are likely to have little difficulty putting together a brief that meets the historical standards of liberal constitutional theory.

b. *Precedent*

The liberal historical case for abortion rights rests primarily on several Supreme Court decisions which offered crucial precedential foundations for

²⁴² Letter from Thomas Jefferson to James Madison, October 28, 1785, *quoted in* 8 THE PAPERS OF THOMAS JEFFERSON 682 (Julian Boyd ed., 1953); *see* letter from Thomas Jefferson to Jean Baptiste Say, February 1, 1804, *quoted in* 11 THE WRITINGS OF THOMAS JEFFERSON 1 (Andrew A. Lipscomb ed., 1903). No proponent of abortion rights has ever discovered a similarly explicit quote from a prominent Framer supporting the right to terminate a pregnancy.

²⁴³ *See* MCCOY, *supra* note 239, at 196-208.

²⁴⁴ *See* KATZ, *supra* note 230, at xii (noting "the depressing past that characterizes American welfare").

²⁴⁵ Compare TRATTNER, *supra* note 234, at 2-21, with *Historians' Brief*, *supra* note 218.

²⁴⁶ *See Roundtable: Historians and the Webster Case*, PUB. HISTORIAN, Summer 1990, at 9; Gerald W. Bradley, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329, 348 n.81 (1993) (discussing discrepancies between the historians' brief in *Webster* and the scholarship of an influential signatory, James Mohr); Michael W. McConnell, *How Not to Promote Serious Deliberation About Abortion*, 58 U. CHI. L. REV. 1181, 1183 n.4 (1991).

Roe.²⁴⁷ However, before 1970, only five cases supported a general right of privacy in family matters.²⁴⁸ None of these cases even hinted that abortion might be another instance of that fundamental right. Judicial opinions highlighted the right to marry,²⁴⁹ the right of marital intimacy,²⁵⁰ the right not to be sterilized,²⁵¹ and the right to direct the upbringing of one's children.²⁵² *Griswold v. Connecticut* now appears to be the precursor of *Roe*, but the actual majority opinion in that case limited the Court's decision to the right of married persons to use contraception. Bans on the use of birth control by husbands and wives were unconstitutional, Justice Harlan stated, because such "statute[s] allow[] the State to enquire into, prove and punish married people for the private use of their marital intimacy."²⁵³ The majority opinions in *Griswold* and

²⁴⁷ *Roe*, 410 U.S. at 152-53; see *TRIBE*, *supra* note 25, at 92-95; *DWORKIN*, *supra* note 25, at 106-07; *DWORKIN*, *supra* note 33, at 50.

²⁴⁸ See *Loving v. Virginia*, 388 U.S. 1 (1967) (freedom to marry); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to marital privacy in use of contraceptives); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right to procreate protected); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (parents' right to teach own children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to teach foreign language); see also *Stanley v. Georgia*, 394 U.S. 557 (1969) (explaining that the Constitution protects possession of obscene materials in one's house); *Katz v. United States*, 389 U.S. 347 (1967) (interpreting the Fourth Amendment as protecting some privacy rights); *Poe v. Ullman*, 367 U.S. 497 (1961) (Douglas, J., dissenting); *id.* at 497 (Harlan, J., dissenting); *Prince v. Massachusetts*, 321 U.S. 158, 165-66 (1944) (recognizing a right to raise one's children, but rejecting the application of that right to child labor laws).

²⁴⁹ See *Loving*, 388 U.S. at 12 ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Griswold*, 381 U.S. at 486; *id.* at 495 (Goldberg, J., concurring); *Skinner*, 316 U.S. at 541; *Meyer*, 262 U.S. at 399.

²⁵⁰ See *Griswold*, 381 U.S. at 486; *id.* at 499 (Goldberg, J., concurring) ("[T]he right of privacy in the marital relation is fundamental and basic."); *id.* at 502-03 (White, J., concurring) ("the right . . . to be free of regulation of the intimacies of the marriage relationship"); *Poe*, 367 U.S. at 552 (Harlan, J., dissenting) ("[I]t is difficult to imagine what is more private or more intimate than a husband and wife's marital relations.").

²⁵¹ See *Griswold*, 381 U.S. at 496 (Goldberg, J., concurring); *Skinner*, 316 U.S. at 536 ([D]escribing "the right to have offspring" as "basic to the perpetuation of the race.").

²⁵² See *Pierce*, 268 U.S. at 534-35 ("the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer*, 262 U.S. at 399 (endorsing the right "to marry, establish a home and bring up children"); see also *Prince*, 321 U.S. at 165-66.

²⁵³ *Poe*, 367 U.S. at 548 (Harlan, J., dissenting). Every judicial opinion in *Griswold* and *Poe* that supported birth control rights explicitly limited the right to married couples. See *Griswold*, 381 U.S. at 486; *id.* at 486, 494-99 (Goldberg, J., concurring); *id.* at 502 (White, J., concurring); *Poe*, 367 U.S. at 515 (Douglas, J., dissenting); *id.* at 539, 546-55 (Harlan,

Poe repeatedly affirmed state power to regulate any expression of non-marital sexuality²⁵⁴ and state power to ban contraception altogether, as long as the regulation did not permit "the police [to] investigat[e] the intimacies of the marriage relation."²⁵⁵ Only in 1972, in *Eisenstadt v. Baird*, did the Supreme Court first rule that "the right of privacy" encompassed "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."²⁵⁶ Feminist defenses of abortion lacked even this limited doctrinal foundation. No case decided before 1970 supported claims that bans on abortion violated the equal protection rights of women. When confronted with gender inequalities, the Supreme Court had for the previous one hundred years consistently ruled that laws discriminating against women did not present any constitutional problems.²⁵⁷

The precedential case for a right to basic necessities, by comparison, was quite strong by 1970. The Court handed down far more decisions supporting the constitutional rights of poor people than the right to privacy. Several cases seemed best explained by an inchoate understanding that persons had a right to the resources necessary to survive. During the 1950s, 1960s, and early months of 1970, the Supreme Court ruled that poor people had constitutional rights to an attorney during every "critical stage" of the criminal process in felony cases²⁵⁸ (including any mandatory appeal),²⁵⁹ to be provided with the

J., dissenting); *see also id.* at 509 (Brennan, J., concurring).

²⁵⁴ *See Griswold*, 381 U.S. at 498-99 (Goldberg, J., concurring) (*Griswold* "in no way interferes with a State's proper regulation of sexual promiscuity or misconduct."); *id.* at 504 (White, J., concurring); *Poe*, 367 U.S. at 546 (Harlan, J., dissenting) ("Laws . . . confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis."); *id.* at 547, 553. Justice Harlan specifically pointed to abortion as a matter that states could constitutionally regulate. *See id.* at 547 (Harlan, J., dissenting).

²⁵⁵ *Poe*, 367 U.S. at 522 (Douglas, J., dissenting); *see id.* at 547-48, 553-55 (Harlan, J., dissenting).

²⁵⁶ 405 U.S. 438, 453 (1972).

²⁵⁷ *See Hoyt v. Florida*, 368 U.S. 57 (1961) (excluding women from juries unless they volunteered); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding a law prohibiting women from bartending unless "the wife or daughter of the male owner"); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding a statute regulating the working hours of women); *Minor v. Happersett*, 88 U.S. 162 (1874) (upholding a provision of the state constitution that denied women the right to vote); *Bradwell v. Illinois*, 83 U.S. 130 (1872) (upholding a state law denying a woman the right to practice as an attorney in the state's courts).

²⁵⁸ *Coleman v. Alabama*, 399 U.S. 1, 9 (1970); *see Mempa v. Rhay*, 389 U.S. 128, 134 (1967) ([T]he Constitution guarantees the right to counsel at sentencing because "appointment of counsel for an indigent is required at every stage of a criminal proceeding

transcripts and other materials necessary to make an effective appeal of any criminal sentence²⁶⁰ (as well as having any fees waived which are related to filing appeals and habeas corpus petitions),²⁶¹ to vote without paying a poll

where substantial rights of a criminal accused may be affected.”); *United States v. Wade*, 388 U.S. 218 (1967) (declaring a right to counsel at post-indictment line-up); *White v. Maryland*, 373 U.S. 59 (1963) (declaring a right to counsel at preliminary hearing); *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (holding that the Constitution guarantees the right to counsel during a felony trial because the “noble ideal [of equality before the law] cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him”); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (declaring a right to counsel at arraignment).

²⁵⁹ See *Douglas v. California*, 372 U.S. 353, 357 (1963) (“[W]here the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.”); see *Anders v. California*, 386 U.S. 738 (1967) (declaring that a state cannot deny an appeal merely because appointed counsel declares that petitioner’s claims have no merit).

²⁶⁰ See *Roberts v. LaVallee*, 389 U.S. 40, 42 (1967) (holding that a state must provide a transcript of a preliminary hearing because “differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution”); *Long v. District Court of Iowa*, 385 U.S. 192, 194 (1966) (holding that a state must provide a transcript to a petitioner appealing an adverse habeas corpus ruling because the *Griffin* “rule applies to protect an indigent against a financial obstacle to the exercise of a state-created right to appeal from an adverse decision in a post-conviction proceeding”); *Draper v. Washington*, 372 U.S. 487, 496 (1963) (holding that a state must provide a free transcript even when the trial judge concludes an appeal would be frivolous because “the State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions”); *Lane v. Brown*, 372 U.S. 477 (1963) (holding that a state must provide a transcript in post-conviction proceedings, even when a public defender says the case has no merit); *Eskridge v. Washington State Bd. of Prison Terms and Paroles*, 357 U.S. 214 (1958) (explaining that state law authorized providing an indigent defendant with a free stenographic transcript of the trial when the judge felt that such an act would promote the interests of justice); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (holding that a state must provide indigents with a free transcript when failure to do so “effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance”); see also *Coppedge v. United States*, 369 U.S. 438 (1962) (interpreting the Federal Rules of Criminal Procedure to require free transcripts and waiver of fees whenever such policies are mandated by the Fifth and Fourteenth Amendments).

²⁶¹ See *Smith v. Bennett*, 365 U.S. 708, 709 (1961) (declaring unconstitutional a state law requiring petitioner to pay a filing fee in order to make a habeas corpus claim because “to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws”); *Burns v. Ohio*, 360 U.S. 252, 258 (1959) (holding that a state cannot require a fee to file a second appeal because “indigents must . . . have the same opportunities to invoke the

tax²⁶² in any election in which they had an interest,²⁶³ to run for office,²⁶⁴ to not have their wages garnished or welfare benefits cut off without notice and a prior evidentiary hearing,²⁶⁵ to live in the state of their choice,²⁶⁶ to enjoy full welfare benefits upon establishing residence,²⁶⁷ and to have their financial circumstances considered when establishing bail.²⁶⁸ In addition, "[l]ines drawn on the basis of wealth or property," the Court declared in *Harper v. Virginia Board of Elections*, "like those of race . . . are traditionally disfavored."²⁶⁹

The language and logic in many of these decisions seemed to point towards a constitutional right to basic necessities. In *Gideon v. Wainwright*, the Supreme Court declared that persons had a constitutional right to an attorney in felony trials because "lawyers in criminal courts are necessities, not luxuries."²⁷⁰ Two weeks before handing down *Dandridge*, the Justices declared that:

Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.... Public

discretion of the [state supreme court]").

²⁶² See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966) (finding that states cannot "make[] the affluence of the voter or payment of any fee an electoral standard").

²⁶³ See *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

²⁶⁴ See *Turner v. Fouche*, 396 U.S. 346, 363 (1970) ("It cannot be seriously urged that a citizen in all other respects qualified to sit on a school board must also own real property.").

²⁶⁵ See *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (holding that a state must conduct an evidentiary hearing before terminating public assistance payments because "termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits"); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (holding that state's prejudgment garnishment procedure violates principles of due process).

²⁶⁶ See *Edwards v. California*, 314 U.S. 160 (1941) (holding that a state law that made it illegal to knowingly transport an indigent person across state lines into the state was unconstitutional).

²⁶⁷ See *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (holding that states cannot deny welfare benefits to new residents because "the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible"), *overruled in part by* *Edelman v. Jordan*, 415 U.S. 651 (1974).

²⁶⁸ See *Stack v. Boyle*, 342 U.S. 1 (1951) (holding that bail must be reasonably calculated to assure the presence of a defendant at trial).

²⁶⁹ 383 U.S. 663, 668 (1966); see *McDonald v. Bd. of Election Comm'ns*, 394 U.S. 802, 806 (1969).

²⁷⁰ 372 U.S. 335, 344 (1963).

assistance . . . is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."²⁷¹

Even sharp critics of egalitarian social policies recognized that the doctrinal foundations for broad constitutional rights were in place by 1970. "A fair evaluation of . . . the existing caselaw," Ralph Winter acknowledged in the early seventies, "would be that the law is well along the road toward substantive equal protection as a vehicle of income redistribution."²⁷² Relying heavily on *Shapiro*, one lower federal court in 1969 ruled that state policies denying welfare benefits pass constitutional muster only if they satisfy the strict scrutiny standard.²⁷³

3. Constitutional Law in 1970

It is not surprising, given the state of American law and political practice in 1970, that scholars on the cutting edge of liberal theory and practice argued for welfare rights rather than for abortion.²⁷⁴ Both rights could be deduced from the same general principles, but recent political and legal precedent pointed far more clearly towards rights to basic necessities than broad privacy or gender rights.²⁷⁵ This is not to claim that the state of welfare law in 1970 should have compelled federal judicial rulings that all persons had a constitutional right to basic necessities. Persons who disagreed with the jurisprudential foundations of *Roe* and *Griswold*, or did not believe in subsistence rights had good constitutional reasons for rejecting the argument for constitutional welfare rights. The point is simply that in 1970, constitutional commentators and authorities could reject the argument for constitutional welfare rights only by rejecting either the jurisprudential foundations of *Roe* or the claim that persons have a fundamental human right to subsistence. Liberals who rejected neither claim had no principled basis upon which to claim that the Constitution protected the right to terminate a pregnancy but not the right to basic necessities. Pro-choice constitutionalists who think that persons have a fundamental human right to basic necessities should have insisted in 1970 that persons also had a constitutional right to basic necessities, a right that could at

²⁷¹ *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970); see *Edwards*, 314 U.S. at 174–75.

²⁷² Winter, *supra* note 118, at 58; see Tribe, *supra* note 55, at 1078–90 (claiming that as of 1977, case law supported a constitutional right to certain basic necessities); Michelman, *Welfare Rights*, *supra* note 49, at 660–65.

²⁷³ See *Rothstein v. Wyman*, 303 F. Supp. 339, 346–47 (S.D.N.Y. 1969).

²⁷⁴ See *supra* notes 45–62 and accompanying text.

²⁷⁵ See *supra* notes 248–73 and accompanying text.

least be partly protected by the Supreme Court.

B. *The Constitutional Status of Welfare and Abortion Rights After Dandridge and Roe*

The relative constitutional status of welfare and abortion rights looks quite different at the present time. Two weeks after handing down *Goldberg v. Kelly*, the Supreme Court in *Dandridge v. Williams* sustained state policies that provided no additional benefits for those persons on state assistance who had more than two children.²⁷⁶ Justice Stewart's majority opinion did not explicitly reject claims that persons had a constitutional right to basic necessities. However, he did find "no basis for applying a different constitutional standard" in cases "involv[ing] the most basic economic needs of impoverished human beings" than in cases "involv[ing] state regulation of business or industry."²⁷⁷ Both state policies, the Court ruled, would only be required to satisfy a traditionally toothless "reasonable basis" test.²⁷⁸ In the opinion of the *Dandridge* majority, "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court."²⁷⁹ Remarkably, the Court three years later decided that the *intractable economic, social, and even philosophical problems* presented by abortion are the business of the Court. The "right [to] privacy," Justice Blackmun ruled in *Roe*, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."²⁸⁰ In sharp contrast to welfare policies, the *Roe* majority ruled that elected officials could regulate abortion only when such measures passed a demanding "compelling state interest" test.²⁸¹

For the past two decades, the Court has created one extensive body of precedent that, with some exceptions, supports conventional liberal defenses of abortion,²⁸² another extensive body of precedent that, with some exceptions,

²⁷⁶ 397 U.S. 471, 487 (1970).

²⁷⁷ *Id.* at 485.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 487.

²⁸⁰ 410 U.S. 113, 153 (1973).

²⁸¹ *Id.* at 155.

²⁸² See *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (reaffirming the "essential holding" of *Roe*); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (declaring an informed consent law unconstitutional); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983) (striking down requirement that second trimester abortions be performed in hospitals); *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983) (striking down hospitalization, consent, notification, and

supports a more feminist defense of abortion rights,²⁸³ and a third extensive body of precedent that, with increasingly fewer exceptions, is hostile to welfare rights.²⁸⁴ "[O]ur cases," the Court now confidently declares, "have recognized

waiting period requirements), *overruled by Casey*, 505 U.S. at 833; *Bellotti v. Baird*, 443 U.S. 622 (1979) (striking down parental consent statute); *Colautti v. Franklin*, 439 U.S. 379 (1979) (striking down fetal protection statute); *Bellotti v. Baird*, 428 U.S. 132 (1976) (striking down parental consent measure); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (striking down fetal protection measure).

The Supreme Court has sustained laws limiting governmental funding for abortions or requiring short waiting periods, informed consent, and parental notice before an abortion can be performed. *See Casey*, 505 U.S. 833; *Rust v. Sullivan*, 500 U.S. 173 (1991); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977). From 1973 to the present, however, the Court has never let elected officials prevent a private physician from granting an abortion to a consenting adult.

²⁸³ At present, "classifications . . . between males and females" will be sustained by the Supreme Court only if they "serve important governmental objectives and [are] substantially related to [the] achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976). More recently, the Court has insisted that "parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification.'" *United States v. Virginia*, 116 S. Ct. 2264, 2274 (1996); *see J.E.B. v. Alabama*, 511 U.S. 127, 142 n.12 (1994); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980); *Califano v. Westcott*, 443 U.S. 76 (1979); *Davis v. Passman*, 442 U.S. 228, 234 (1979); *Orr v. Orr*, 440 U.S. 268, 279 (1979); *Califano v. Goldfarb*, 430 U.S. 199, 210 (1977). For cases decided between 1971 and 1975 using heightened scrutiny to evaluate gender based classifications, *see Stanton v. Stanton*, 421 U.S. 7 (1975); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973); *Stanley v. Illinois*, 405 U.S. 645, 656-58 (1972); *Reed v. Reed*, 404 U.S. 71, 75-77 (1971). Significantly, Justice Blackmun in *Casey* cited both *Hogan* and *Boren* in support of a woman's right to abortion. *See Casey*, 505 U.S. at 927-28 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

A Supreme Court decision based on the feminist defense of abortion rights would have to explicitly or implicitly overrule (or substantially narrow) a previous judicial ruling that laws excluding pregnancy and childbirth from disability programs do not discriminate on the basis of gender. *See Geduldig v. Aiello*, 417 U.S. 484, 495 (1974); *see also Rostker v. Goldberg*, 453 U.S. 57 (1981) (holding that gender differences justify requiring only males to register for the draft); *Michael M. v. Superior Court*, 450 U.S. 464, 476 (1981) (holding that gender differences justify punishing only underage males for statutory rape).

²⁸⁴ Judicial decisions until 1975 were a mixed bag. For cases supporting the constitutional rights of poor people, *see United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (invalidating provision of Food Stamp Act of 1964 that required all members of a household be related to receive benefits); *United States Dep't of Agric. v. Murry*, 413 U.S. 508 (1973) (holding that a parent's tax deduction is not a rational measure of need for a

that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests."²⁸⁵ Enjoying substantial support from the first two bodies of precedent, liberal constitutional theorists defending abortion rights merely have to explain why the Supreme Court should not overrule *Roe*. When defending welfare rights, liberals must ask the Court to distinguish, narrow, or overrule numerous recent precedent. Given that liberal constitutional theorists regard precedent as an important source of constitutional meaning,²⁸⁶ Supreme Court practice over the past two decades probably explains why contemporary liberals think the Constitution protects abortion rights, but not welfare rights.

Nonetheless, the present status of abortion and welfare rights in liberal

household); *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973) (invalidating statute limiting benefits of "Assistance to Families of Working Poor" on equal protection grounds); *Bullock v. Carter*, 405 U.S. 134 (1972) (invalidating filing fee requirement for Texas elections); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (invalidating a Florida statute that permitted repossession without a hearing); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that an indigent could not be refused a divorce solely due to inability to pay court fees); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (upholding an indigent's right to counsel for petty offenses); *Williams v. Illinois*, 399 U.S. 235 (1970) (holding that a state may not hold a prisoner beyond his or her sentence because of indigency).

For cases rejecting such claims, see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (upholding unequal school funding due to disparities in property values); *Ortwein v. Schwab*, 410 U.S. 656 (1973) (upholding a \$25 filing fee as a requirement to receive welfare benefits); *United States v. Kras*, 409 U.S. 434 (1973) (holding that there is no constitutional right to discharge one's debts in bankruptcy); *Jefferson v. Hackney*, 406 U.S. 535 (1972) (upholding percentage reduction factor in calculation of AFDC benefits to persons without outside income); *James v. Valtierra*, 402 U.S. 137 (1971) (upholding provision of California Constitution requiring approval of majority of voters in a community before low-rent housing could be built); *Wyman v. James*, 400 U.S. 309 (1971) (upholding home visitation law in connection with the AFDC program).

After 1975, the Supreme Court almost always rejected claims that some governmental practice violated the constitutional rights of poor people. See *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450 (1988) (holding that states are not required to provide free bus service to public schools); *Lyng v. International Union, United Auto., Aerospace, and Agric. Implant Workers*, 485 U.S. 360 (1988) (holding that the federal government may deny food stamps to striking workers); *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841 (1984) (holding that the federal government may condition financial assistance to college students on their registering for the draft); *Maher v. Roe*, 432 U.S. 464 (1977) (holding that a state is not required to pay the expenses for nontherapeutic abortion for indigent women); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (upholding the termination of disability benefits before an evidentiary hearing).

²⁸⁵ *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 196 (1989).

²⁸⁶ See *supra* notes 92-94 and accompanying text.

constitutional theory remains troubling. No liberal constitutional theorist explicitly claims that recent precedent explains why the Constitution affords more protection to abortion than welfare. Dworkin, in particular, implies that Michelman's defense of welfare rights was wrong when first published in 1969.²⁸⁷ Moreover, precedent in other areas of law does not seem to play as powerful a role in liberal constitutional theory. Liberals demand that the Court overrule decisions denying poor women the funds to purchase an abortion or permitting states to ban homosexual sodomy.²⁸⁸ This stridency might be justified on the grounds that the judicial rulings in question are inconsistent with the general principles the Court is presently articulating in privacy and gender cases.²⁸⁹ Still, welfare seems the only broad area of law in which liberal constitutional theorists accord constitutional standing to Burger and Rehnquist Court decisions. Dworkin, for example, exhibited little feeling for precedent when he recently maintained that "even if *Buckley* remains, we should feel no compunction in declaring the decision a mistake, and in attempting to avoid its consequences through any reasonable and effective device we can find or construct."²⁹⁰ Why do the same principles not apply to *Dandridge* or *Rodriguez*? At the very least, liberal constitutional theorists should explain more clearly whether precedent provides the constitutional distinction between abortion and welfare rights, and why precedent seemingly plays such a uniquely strong role in welfare cases.

Even if twenty-five years of conservative decisions explain why liberals now think the Constitution provides more protection for abortion rights than welfare rights, past precedent cannot explain why during the 1970s the centrist judges on the Burger Court were more solicitous of abortion than welfare rights. In the years before *Dandridge* and *Roe*, the textual, historical, and precedential case for the right to basic necessities was at least as strong, if not stronger, than the textual, historical, and precedential case for the right to terminate a pregnancy.²⁹¹ The only constitutional basis available during the 1970s for judicial decisions providing more protection for abortion rights than welfare rights seems to be an inchoate belief, never articulated in any judicial decision, that the right to terminate a pregnancy is more fundamental than the right to certain basic necessities. No other form of constitutional logic explains the different directions the Supreme Court took in abortion and welfare cases after 1970.

²⁸⁷ See *supra* note 80–82 and accompanying text.

²⁸⁸ See *supra* notes 35, 99 and accompanying text.

²⁸⁹ See *supra* notes 282–83.

²⁹⁰ Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 19, 24.

²⁹¹ See *supra* Parts II.A.1–2.

Thus, liberal constitutional theory is accepting, on the basis of recent judicial decisions, an unexplained distinction between abortion rights and welfare rights that makes no sense in liberal moral theory or a liberal theory of human rights. The centrist justices on the Burger and Rehnquist Courts apparently think that abortion is a fundamental human right and that sufficient basis in constitutional history and theory exists to justify declaring this human right a fundamental constitutional right. The same centrist justices do not, however, think that persons have a fundamental human right to receive basic necessities from the State. Hence, they are not interested in taking advantage of whatever openings history might present for declaring a constitutional right to basic necessities. Liberals may disagree with the judicial judgment that persons have no fundamental right to receive basic necessities from the State. They may even think the Burger and Rehnquist Courts' priorities morally perverse. Twenty-five years of precedent to the contrary have apparently closed, at least temporarily, the constitutional opportunity that may have been present in 1970 for declaring or even defending constitutional welfare rights.

C. The Strategic Case for Abortion and Welfare Rights

Strategic considerations provide a related explanation and justification for why liberal constitutional theory places far greater emphasis on abortion rights than on welfare rights. Liberal lawyers are presently far more likely to persuade federal courts that *Roe* should remain good law and be expanded than they are to persuade federal courts that *Dandridge*, *Rodriguez*, and numerous other cases should be narrowed or overruled. As welfare rights advocate Barbara Sard sadly comments, "the potential for use of equal protection challenges to aid welfare recipients is negligible, at least in federal courts."²⁹² This real limit on liberal advocacy before a conservative judiciary suggests that the recent claim that no judicially enforceable constitutional right to welfare exists is more tactical than heartfelt.²⁹³

Even if a constitutional case can be made that past precedent supports constitutional entitlements to basic minimums (perhaps when government

²⁹² Barbara Sard, *The Role of Courts in Welfare Reform*, 22 CLEARINGHOUSE REV. 367, 375 (1988); see also Romesh Ratnesar, *Mock Trial*, THE NEW REPUBLIC, Dec. 9, 1996, at 16 (addressing the limited role courts were expected to play in championing the rights of the poor after the new welfare legislation was enacted); DAVIS, *supra* note 53, at 3; Diller, *supra* note 84, at 1420; Braveman, *supra* note 231, at 591-93.

²⁹³ The tactical merits of emphasizing abortion may also explain why neither Tribe nor Dworkin explain at any length why welfare rights do not follow from the broad constitutional principles they believe should guide judicial decisionmaking.

supplies the good in question to most citizens),²⁹⁴ the present Supreme Court is not likely to accept any doctrinal argument which concludes that poor people have a constitutional right to certain goods (except, perhaps, in the context of a judicial proceeding).²⁹⁵ Hence, conceding that a guaranteed income is an example of a just policy that is not constitutionally mandated may be an effective rhetorical tactic to convince skeptics that liberals who defend the constitutional right to legal abortion are not simply importing their views of wise policy into the Constitution.

However, liberals may bear some responsibility for the present priorities of the federal judiciary. President Clinton appointed two Justices previously on record as supporting the result in *Roe*, but backed away from his commitment to appoint Peter Edelman, a prominent advocate of welfare rights, to the bench.²⁹⁶ On virtually every other civil liberties issue other than abortion, Clinton's judicial appointees have demonstrated no special proclivities to adopt liberal positions.²⁹⁷ Justice Breyer, during his confirmation process, was criticized by liberal activists for generally favoring business interests when he served on the lower federal bench. Ralph Nader went so far as to label Breyer "the corporate candidate for the Supreme Court."²⁹⁸ Still, liberals seemed disinterested in whether that nomination might presage a return to Warren

²⁹⁴ See Edelman, *supra* note 119, at 48–50 (suggesting advocating survival rights in a state court).

²⁹⁵ See *M.L.B. v. S.L.J.*, 117 S. Ct. 555 (1996) (holding that a state cannot constitutionally require poor people to pay a fee in order to appeal an adverse parental termination ruling); *Ake v. Oklahoma*, 470 U.S. 68 (1985) (holding that a defendant in a capital case has the right to the funds necessary to hire a psychiatrist).

²⁹⁶ See Neil A. Lewis, *A Friendship in Tatters Over Policy*, N.Y. TIMES, Sept. 13, 1996, at A26 (regarding Clinton's change of heart in reaction to conservative resistance to the Edelman appointment).

²⁹⁷ See Ronald Stidham et al., *The Voting Behavior of President Clinton's Judicial Appointees*, 80 JUDICATURE, July-Aug. 1996, at 16; Nat Hentoff, *Bill Clinton's Judges: Clinton's Nominees Are Less Liberal than Ford's and Nixon's*, THE VILLAGE VOICE, Oct. 29, 1996, at 25; John Nichols, *The Clinton Courts: Liberals Need Not Apply*, 60 THE PROGRESSIVE, Sept. 1996, at 25. Court observers note that "Clinton has avoided potential nominees with a record of defending the poorest Americans." *Id.* at 28; see also Jeffrey Toobin, *Clinton's Left-Hand Man*, THE NEW YORKER, July 21, 1997, at 28–30. These judicial appointment practices reflect broader Clinton administration priorities. Jeffrey Toobin notes that "with the single important exception of abortion, where Clinton has remained steadfastly pro-choice, the President's record on individual rights is distinguishable from that of his Republican predecessors only in that he has been more conservative." *Id.* at 30

²⁹⁸ Ralph Nader quoted in Joan Biskopic, *A Moderate Pragmatist: Nominee Widely Admired in Legal Circles*, WASH. POST, May 14, 1994, at A1; see Nichols, *supra* note 297, at 26.

Court activism in many areas of constitutional law. The "assum[ption] that Breyer would take a pro-choice stance," was, "for many progressives . . . sufficient justification for supporting his nomination."²⁹⁹

Liberal interest groups and their political allies demonstrated similar priorities when evaluating Republican judicial nominees. Pro-choice constitutionalists fought hard to prevent Presidents Reagan and Bush from packing the judiciary with jurists committed to overruling *Roe*.³⁰⁰ Few persons active during the judicial confirmation battles of the 1980s exhibited any public interest in how Republican judicial nominees would rule on the constitutional rights of the poor and labor. Leading Senators and their political supporters repeatedly reminded the public that Robert Bork had condemned constitutional privacy rights. They did not inform the electorate that Bork also believed "finding welfare rights in the Constitution [was] impossibl[e]."³⁰¹ Liberal politicians and activists seemed contented when Republican Presidents nominated judges willing to recognize some unenumerated privacy rights, even though those judges gave no indication that they would also recognize some unenumerated welfare rights.³⁰² Thus, the present Court's different treatment of abortion and welfare rights is partly a consequence of President Clinton's nominating practices and the campaigns against pro-life judicial nominees that liberals waged during the Bush and Reagan administrations.

Liberal approaches to staffing the federal judiciary may reflect tactical considerations rather than a heartfelt belief that justices should protect abortion rights but not rights to basic necessities. The coalition of groups opposed to Bork tested many issues when determining what arguments would most likely sway Senators and their constituencies to oppose the Reagan Administration. Privacy was chosen rather than welfare because studies showed that the public was more interested in retaining privacy rights than in having the Court protect

²⁹⁹ Nichols, *supra* note 297, at 26.

³⁰⁰ See ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 20, 26, 98-99, 139 (1989); MICHAEL PERTSCHUK & WENDY SCHAETZEL, THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION 24-25, 39, 127-28, 138-39 (1989).

³⁰¹ Bork, *supra* note 118, at 695; see BRONNER, *supra* note 300, at 208-76; PERTSCHUK & SCHAETZEL, *supra* note 300, at 221-26; see also Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, STUD. IN AM. POL. DEV., Spring 1993, at 35, 60-61 (discussing Democratic party political priorities during the Bork and Thomas confirmation processes). The anti-Bork coalition was concerned with Bork's tendency to favor business interests in conflicts with consumers and workers. See PERTSCHUK & SCHAETZEL, *supra* note 300, at 70, 79, 137-38, 185.

³⁰² See PERTSCHUK & SCHAETZEL, *supra* note 300, at 239-40; BRONNER, *supra* note 300, at 337-38.

rights to certain basic necessities.³⁰³ Given public hostility to welfare,³⁰⁴ at least under that name,³⁰⁵ public awareness that a judicial nominee found no welfare rights in the Constitution would probably increase popular support for confirmation. In the present political environment, liberals may not have a practical choice between abortion and welfare rights when engaging in struggles over the composition of the federal bench or fighting other political battles. To the extent liberals in national political struggles insist that government provide all poor persons with certain basic necessities, they lose. To the extent that liberals in national political struggles fight to keep abortion legal, they may win.³⁰⁶

At this time, the best liberal constitutional arguments and the best liberal strategic arguments for preferring abortion rights to welfare rights converge. Tribe and Dworkin believe that persons have a fundamental human right to abortion and a fundamental human right to have government provide them with certain basic necessities.³⁰⁷ Unfortunately, although the present judicial majority and many Americans endorse some version of the liberal claim that abortion is a fundamental right, the present judicial majority and most Americans reject the liberal claim that persons have a fundamental right to be provided with certain basic necessities. For these reasons, the federal judiciary presently protects abortion rights but not welfare rights, and influential politicians are staffing the federal judiciary with judges that are inclined to maintain that status quo. Liberals may prefer a status quo sympathetic to both abortion and welfare rights. Nevertheless, because they believe that precedents are an important source of constitutional meaning and wish to secure as many rights as possible, contemporary liberals follow more conservative inclinations and insist that the Constitution protects the right to terminate a pregnancy but not the right to be provided with certain basic necessities.

³⁰³ See PERTSCHUK & SCHAETZEL, *supra* note 300, at 127–32, 144.

³⁰⁴ See NORMAN J. ORNSTEIN ET AL., *THE PEOPLE, THE PRESS & POLITICS: THE NEW POLITICAL LANDSCAPE* 4, 129, 142–43, 153–55 (1994).

³⁰⁵ One survey found that “average support for more assistance for the poor is 39 percentage points higher than for welfare.” Tom W. Smith, *That Which We Call Welfare By Any Other Name Would Smell Sweeter: An Analysis of the Impact of Question Wording on Response Patterns*, PUB. OPINION Q. Spring 1987, at 75, 76; see FAY LOMAX COOK & EDITH J. BARRETT, *SUPPORT FOR THE AMERICAN WELFARE STATE: THE VIEWS OF CONGRESS AND THE PUBLIC* 27 (1992). For a more general discussion of “response instability,” see JOHN R. ZALLER, *THE NATURE AND ORIGINS OF MASS OPINION* 53–96 (1992).

³⁰⁶ Obviously, many local districts exist where liberals are better advised to emphasize welfare rights than abortion rights.

³⁰⁷ See *supra* notes 31–34 and accompanying text.

III. ABORTION AND WELFARE AS CONSTITUTIONAL PARADIGMS

A. *The Rough Rule of Three*

Liberal constitutional theory seems structured by a rough rule of three. Liberal law professors construct constitutional justifications for those liberal policies that they believe at least three Supreme Court Justices might endorse.³⁰⁸ During the 1960s and 1970s, when at least three Justices seemed willing to declare a constitutional right to livelihood, liberal law professors eagerly provided those Justices with arguments that could be used towards that end. During the 1980s and 1990s, when no Supreme Court Justice seemed willing to declare a constitutional right to livelihood, liberal law professors either dropped the subject or briefly stated that no constitutional right to livelihood existed. Supreme Court majorities during the 1980s and 1990s have been willing to defend abortion and other privacy rights. Hence, liberal constitutional theorists presently spend their energies providing their judicial allies with arguments that can be used to affirm *Roe* and to overrule or narrow *Bowers v. Hardwick*.³⁰⁹ Contemporary liberal constitutional theory probably highlights abortion, privacy, and gender rights because these are the areas of constitutional law where Rehnquist Court majorities have been willing to maintain, expand, and occasionally establish liberal precedent.³¹⁰

The rough rule of three, although rough, has much merit. Politics is partly the art of the possible. Establishing priorities by multiplying the importance of a right by the probability that constitutional authorities will recognize that right seems to be a reasonable liberal tactic in a conservative age. Liberal constitutional theorists who concentrate their efforts on keeping abortion legal have hardly abandoned their concern for the poor. By the early 1970s, anyone who could afford to travel to New York or California enjoyed a de facto right to abortion on demand. The primary beneficiaries of *Roe* were poor persons and persons of color who enjoyed access to safe and legal abortion for the first time in American history.³¹¹ Should *Roe* be overruled, the burden will once again fall on those poor people who live more than a short bus ride away from a pro-choice state.³¹² Although contemporary liberals no longer claim that

³⁰⁸ For a similar claim, see J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703, 1732-35 (1997).

³⁰⁹ 478 U.S. 186 (1986) (upholding a law prohibiting sodomy).

³¹⁰ See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Romer v. Evans*, 116 S. Ct. 1620 (1996); *United States v. Virginia*, 116 S. Ct. 2264 (1996) (holding that women must be admitted to a formerly all-male military school).

³¹¹ See GRABER, *supra* note 36, at 62, 65-72.

³¹² See *id.* at 72-75.

restrictions on abortion violate the constitutional rights of poor people,³¹³ their defense of *Roe*, in practice, primarily secures abortion rights for poor people.³¹⁴ Less fortunate Americans will not benefit, however, if in a hopeless quest to secure constitutional rights to basic necessities, liberal constitutional theorists weaken the argument for keeping abortion legal.

Nevertheless, the rough rule of three is problematic, both strategically and constitutionally. Obsessed with the Supreme Court's unwillingness to declare rights to certain basic necessities, liberal constitutional theorists may be overlooking the numerous ways in which federal and state courts might promote the constitutional rights of poor people. The rough rule of three also conflates efforts to describe the best vision of the American constitutional order with efforts to get the best possible results out of a very conservative Court. Too many basic constitutional aspirations are lost when constitutional theory is limited to justifications for those rights that Justices Souter, O'Connor, and Kennedy might be persuaded to protect. Finally, a constitutional theory tethered to recent precedent threatens to be co-opted by a Rehnquist Court practice that subverts a vital tenet of American constitutionalism. By emphasizing abortion rather than welfare, because those are the rights a Republican Court might recognize, liberal constitutional theorists are participating in practices that threaten to convert an institution based on elite public values into an institution that primarily services elite interests.

³¹³ Liberal arguments for abortion rights during the 1950s and 1960s insisted that malenforced restrictions on abortion violated the constitutional rights of poor people. "The poor," Professors Alan Charles and Susan Alexander declared, "are being denied a service which is lawfully available to others; the service is of great importance to their lives and health; the denial is because of artificial barriers created by the state." Alan Charles & Susan Alexander, *Abortions for Poor and Nonwhite Women: A Denial of Equal Protection*, 23 HASTINGS L.J. 147, 168 (1971); see Roy Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C. L. REV. 730, 763, 771-73 (1968) (discussing the racial disparities in loss of life due to criminalized abortion); see also GRABER, *supra* note 36, at 63-64 (discussing discriminatory impact of abortion law); LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* 174-76, 179 (1992). These class disparities seemed to have made some Justices more receptive to the more general argument for legal abortion. See GRABER, *supra* note 36, at 64.

³¹⁴ Significantly, restrictions on governmental funding and other state regulations regarding abortion have little impact on the abortion rates of poor women. See Willard Cates, Jr., *The Hyde Amendment in Action: How Did the Restriction of Federal Funds for Abortion Affect Low-Income Women?*, 246 JAMA 1109 (1981) (discussing the surprising lack of effect the Hyde Amendment had on abortion rates among low-income women); see also GRABER, *supra* note 36, at 68-69 (citing numerous sources).

B. Strategic Considerations

The strategic case for contemporary liberal priorities is more complicated than a brief look at the present status of *Dandridge* and *Roe* initially suggests. Rehnquist Court Justices do not favor constitutional rights to livelihood, but many lesser constitutional claims to welfare benefits still satisfy the rough rule of three. None of the precedents from the 1960s and early 1970s protecting the constitutional rights of poor people have been explicitly overruled.³¹⁵ Many of these precedents may continue to command judicial support when applied narrowly.³¹⁶ Protecting existing entitlements is not as exciting as fashioning creative arguments that, if adopted, will transform the constitutional universe. Nonetheless, welfare advocates recognize that "even the sorely inadequate status quo will often get worse without defensive actions."³¹⁷ Recent legislative efforts to reduce benefits and control the lives of welfare recipients³¹⁸ should inspire liberal constitutional theorists to examine the resources in contemporary case law that might prevent poor people from being deprived of those vital goods and services that they presently enjoy. Liberal scholars can provide justices with updated reasons for reaffirming such decisions as *Shapiro* and *Goldberg*, as well as more explicit constitutional grounds for past judicial decisions rejecting "employable mother" or "man in the house" restrictions on welfare eligibility.³¹⁹

Dworkin, Tribe, and other liberal constitutionalists who purport to honor recent precedent should place particular emphasis on previous Supreme Court rulings which announced a constitutional presumption that welfare laws be

³¹⁵ Justice Thomas, Justice Scalia, and Chief Justice Rehnquist do seem willing to overrule the *Griffin* line of cases. See *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 557-67 (1996) (Thomas, J., dissenting); see also *supra* note 260.

³¹⁶ See *id.* at 562, 566 (ruling that the "tightly circumscribed category of parental status termination cases" belongs to "a narrow category of civil cases in which the State must provide access to its judicial processes without regard to a party's ability to pay court fees"); see generally Diller, *supra* note 84, at 1421-22 (emphasizing the importance of making narrow claims in welfare rights cases).

³¹⁷ Sard, *supra* note 292, at 367 n.2.

³¹⁸ For examples of legislation that has been passed or proposed, see Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (to be codified at 42 U.S.C. 1305); CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 65-77 (Ed Gillespie & Bob Schellhas eds., 1994); JAMES G. GIMPEL, LEGISLATING THE REVOLUTION: THE CONTRACT WITH AMERICA IN ITS FIRST 100 DAYS (1996); Appleton, *supra* note 64, at 3-7.

³¹⁹ See *King v. Smith*, 392 U.S. 309 (1968).

interpreted liberally.³²⁰ Some Rehnquist Court Justices who will never endorse the new property might prove willing to affirm past decisions that require state and federal legislators to state clearly any intended limit on the persons eligible for state assistance. Poor people will clearly benefit if the present judicial majority treats as *stare decisis* a 1972 case which held that courts “cannot assume . . . that while Congress ‘intended to provide programs for economic security and protection of all children,’ it also ‘intended arbitrarily to leave one class of destitute children entirely without meaningful protection.’”³²¹ Given the prominent role statutory interpretation plays in welfare litigation,³²² justices who broadly construe welfare laws will probably have almost as much impact as justices who explicitly find welfare rights in the Constitution.

The strategic case against aggressive assertion of rights to basic necessities overlooks how minor doctrinal victories in welfare cases often have major impacts on the lives of poor people. Courts have a limited capacity to influence public policy in many areas of law,³²³ but organizers of poor people’s movements believe that the litigation campaigns of the 1960s helped numerous people receive aid or improved benefits. Relief rolls increased dramatically almost immediately after courts struck down local welfare restrictions. Frances Fox Piven and Richard A. Cloward estimate that “at least 100,000 persons annually had been denied aid because of [the] residenc[y] laws” declared unconstitutional in *Shapiro*.³²⁴ They also state that “tens of thousands of families were denied aid under [an] employable mother rule[]” that lower federal courts in 1968 declared unconstitutional.³²⁵ Edward Sparer maintains that by striking down the “‘substitute father’ rule” in *King v. Smith*, the Supreme Court “opened the welfare rolls to over half a million children.”³²⁶ One welfare rights advocate even suggests that “[a]s a direct result of judicial

³²⁰ For one such argument, see Sard, *supra* note 292, at 377–78.

³²¹ *Carlson v. Remillard*, 406 U.S. 598, 604 (1972) (quoting *King*, 392 U.S. at 330); see *Townsend v. Swank*, 404 U.S. 282, 286 (1972) (“[I]n the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act.”). For a similar presumption in state courts, see *Hodge v. Ginsberg*, 303 S.E.2d 245, 250 (W.Va. 1983); *McGraw v. Hansbarger*, 301 S.E.2d 848, 854 (W.Va. 1983).

³²² See R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* (1994) (addressing impact of judicial interpretation of federal laws on social programs).

³²³ See ROSENBERG, *supra* note 188 (discussing courts’ ability to produce changes).

³²⁴ FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 309 (1971).

³²⁵ *Id.*; see *Anderson v. Burson*, 300 F. Supp. 401 (N.D. Ga. 1968).

³²⁶ Sparer, *Right*, *supra* note 54, at 69 (discussing *King v. Smith*, 392 U.S. 309, 330 (1968)).

decisions, as well as the indirect effects of the publicity and increased legitimacy stemming from such litigation and concurrent welfare rights organizing, literally millions of needy families received welfare benefits."³²⁷ Judicial decisions rejecting narrow readings of existing welfare laws have had similarly strong impacts. Liberal "judicial interpretation[s] of entitlement statutes," R. Shep Melnick's study demonstrates, have "substantially enlarged programs for the poor."³²⁸ Even the threat of constitutional litigation may increase benefits. State officials in New York during the 1960s often avoided litigation by providing or restoring benefits to persons who threatened lawsuits.³²⁹

Practitioners have experienced difficulties realizing benefits from favorable poverty law decisions.³³⁰ Still, such cases as *King v. Smith*, *Shapiro*, and *Goldberg* have had a greater impact on government practices than such poorly implemented decisions as *Mapp v. Ohio*.³³¹ Gerald Rosenberg suggests a possible reason why welfare rights litigation seems a more promising means for realizing social change than litigation in other areas of the law. "Court orders," he notes, "give *administrators who wish to make reforms* an additional tool for obtaining the necessary support and resources."³³² Social movements can expect to reap the benefits of favorable judicial decisions to the extent that the persons who must actually respond to court orders are sympathetic to the policy made by the judiciary.³³³ Welfare policies meet this standard. Many social workers support higher benefits for their clients.³³⁴ Hence, they are far more likely to comply with court decisions granting those benefits than police officers are likely to obey court decisions that they believe limit their capacity to conduct criminal investigations.

Some major doctrinal victories in abortion cases, by comparison, have had a minor impact on the reproductive choices open to American citizens. Whether *Roe* dramatically changed American abortion practices is a subject of

³²⁷ Sard, *supra* note 292, at 367. See generally, GREENBERG, *supra* note 52, at 29 ("A measure of justice and civil liberty was brought to many recipients and many unjustly kept off the rolls were put on or restored."); LAWRENCE, *supra* note 59, at 127; DAVIS, *supra* note 53, at 68, 76, 86.

³²⁸ MELNICK, *supra* note 322, at 7; see Diller, *supra* note 84, at 1423-24 (discussing successful litigation efforts to prevent the Reagan Administration from cutting disability benefits).

³²⁹ See DAVIS, *supra* note 53, at 41, 68-69, 76; MELNICK, *supra* note 322, at 100.

³³⁰ See DAVIS, *supra* note 53, at 136-37.

³³¹ 367 U.S. 643 (1961). For the difficulties implementing *Mapp*, see HOROWITZ, *supra* note 183, at 220-54; ROSENBERG, *supra* note 188, at 316-24.

³³² ROSENBERG, *supra* note 188, at 34.

³³³ *Id.* at 33-36.

³³⁴ See DAVIS, *supra* note 53, at 42-43, 46, 52-54, 123.

controversy.³³⁵ Had that decision been overruled in *Casey*, abortion would have remained legal in a sufficient number of states so that most women would have retained a de facto right to terminate unwanted pregnancies.³³⁶ Studies by the fervently pro-choice Guttmacher Institute demonstrate that judicial decisions sustaining government bans on abortion funding and various abortion regulations are not preventing most poor women from terminating unwanted pregnancies safely and legally.³³⁷ These adverse judicial decisions are having some consequences, and for the most part, have disproportionately burdened poor persons.³³⁸ Still, impact studies indicate that liberals concerned with the practical effect on the lives of the poor may not easily determine whether their constitutional energies are best spent defending and expanding existing privacy rights or defending existing welfare rights.

The rough rule of three fails to recognize that liberal constitutional claims can be pitched to state judges, who are authorized to interpret equal protection, due process, or similar clauses in the state constitution more liberally than the present Supreme Court interprets the analogous passages in the federal Constitution.³³⁹ Litigation efforts to secure basic necessities seem particularly promising in states whose constitutions contain more explicit textual protections for poor people than the federal Constitution.³⁴⁰ The New York Constitution, for example, declares that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."³⁴¹ The record of state courts in welfare cases is hardly sterling.³⁴²

³³⁵ Compare ROSENBERG, *supra* note 188, at 175–201 (suggesting that the Court played a lesser role in securing legal abortion than is ordinarily thought to be the case), with GRABER, *supra* note 36, at 124–25 (suggesting that *Roe* may have had a greater impact than Rosenberg acknowledges).

³³⁶ See GRABER, *supra* note 36, at 73–75.

³³⁷ For citation to relevant sources, see *id.*

³³⁸ See *id.* at 68–72.

³³⁹ See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Edelman, *supra* note 119, at 8, 55; Ramsey & Braveman, *supra* note 231, at 1622, 1628–29. Proponents of the rough rule of three should realize that, particularly on matters of statutory interpretation, lower federal courts often make decisions that are not reviewed by the Supreme Court. See MELNICK, *supra* note 322, at 39–40.

³⁴⁰ See Braveman, *supra* note 231, at 596 (noting that twelve state constitutions "include[] provisions that . . . refer to a governmental obligation to care for the needy or protect the health of all citizens").

³⁴¹ N.Y. CONST. art. XVII, § 1; see *Tucker v. Toia*, 371 N.E.2d 449, 452 (N.Y. 1977) ("[S]ection 1 of article XVII imposes upon the State an affirmative duty to aid the needy."); *Lee v. Smith*, 373 N.E.2d 247, 250 (N.Y. 1977). For a sampling of how the New York

bench has interpreted this duty, see *infra* notes 343, 347.

³⁴² See *Moore v. Ganim*, 660 A.2d 742, 755-59 (Conn. 1995) (citing numerous state opinions rejecting constitutional welfare rights); *Tilden v. Hayward*, No. 11297, 1990 LEXIS 140 (New Castle Sept. 10, 1990) (refusing housing entitlement rights); *People v. Lyons*, 30 N.E.2d 46 (Ill. 1940) (upholding a residency law that was unfavorable to indigents); *Warrior v. Thompson*, 449 N.E.2d 53 (Ill. 1983) (holding that elimination of hospital benefits to recipients of general assistance was constitutional); *Bullock v. Whiteman*, 865 P.2d 197 (Kan. 1993) (rejecting claims that regulations restricting benefits for general assistance were unconstitutional); *North Dakota v. Perkins County*, 9 N.W.2d 500 (N.D. 1943) (upholding residency law that was unfavorable to indigents); *Kratzer v. Commonwealth*, 481 A.2d 1380 (Pa. 1984) (holding stepparents' income may be considered when determining child's aid under AFDC); *Conklin v. Shipoch*, 730 P.2d 643 (Wash. 1987) (rejecting claim that general assistance program was unconstitutional); *Diller*, *supra* note 84, at 1421; *Ramsey & Braveman*, *supra* note 231, at 1626-29.

Many state courts have announced in dicta that "there is no legal obligation upon the state to support its poor at all." *Beck v. Buena Park Hotel Corp.*, 196 N.E.2d 686, 688 (Ill. 1964); see also *Newland v. Child*, 254 P.2d 1066, 1070 (Idaho 1953) ("The theory of the American political system is that the citizen supports the state, not the reverse. Even as to . . . indigents, there is no constitutional or common law duty resting upon the state."); *City of Champaign v. City of Champaign Township*, 156 N.E.2d 543, 545 (Ill. 1959) ("There is neither a constitutional nor common law obligation upon any governmental unit to support the poor and destitute."); *Collins v. State Bd. of Social Welfare*, 81 N.W.2d 4, 7 (Iowa 1957) ("[T]here is no common law or constitutional duty resting upon the state to provide support, the obligation is a moral rather than mandatory one."); *Inhabitants of Town of Orrington v. City of Bangor*, 46 A.2d 406, 407 (Me. 1946) ("At common law, public authorities were not liable for the support of paupers."); *Senior Citizens League v. Dep't of Soc. Sec.*, 228 P.2d 478, 483 (Wash. 1951), *quoted in* *Ellis v. State Dep't of Pub. Health & Welfare*, 285 S.W.2d 634, 638 (Mo. 1955) ("Recipients [of governmental aid] have no vested interest in the public assistance they are receiving or desire to receive."); *Elliot v. Ehrlich*, 280 N.W.2d 637, 641 (Neb. 1979) ("Welfare benefits are not a fundamental right."); *Mary Lanning Mem'l Hosp. v. Clay County*, 101 N.W.2d 510, 513 (Neb. 1960) (stating there was no constitutional duty upon a county to pay for care of indigents, but state could impose such a duty); *Division of Aid for the Aged, Dep't of Pub. Welfare v. Hogan*, 54 N.E.2d 781, 782 (Ohio 1944) ("[T]here is no constitutional or common-law duty on the part of . . . any governmental unit to support poor and destitute persons."); *Multnomah County v. Luihn*, 178 P.2d 159, 169 (Or. 1947) ("There is no obligation at common law upon the state or its political subdivisions to furnish relief for the poor.").

Initial appearances to the contrary, most of the cases cited above do not foreclose state constitutional claims for welfare rights. Some of these cases hold that some other constitutional or statutory right of a poor person has been violated. See *Collins*, 81 N.W.2d at 8-9 (declaring unconstitutional under the state constitution a maximum on welfare payments to any family); *City of Champaign*, 156 N.E.2d at 549 (declaring a city liable for hospital costs of indigents under relevant code sections); *Ellis*, 285 S.W.2d at 636 (ruling that benefits were terminated without adequate hearing); *Elliot*, 280 N.W.2d at 642 (declaring

However, many local tribunals have accepted statutory and state constitutional claims to basic necessities that were rejected by federal courts.³⁴³ Some

unconstitutional "an irrebuttable presumption that the income of maternal grandparents is contributed to the needs of the unborn grandchild").

In other cases, the actual issue before the court was which branch of government was legally obligated to pay welfare benefits or whether welfare benefits could be recouped from an estate. *See Beck*, 196 N.E.2d at 687-89 (ruling public aid commission could recover medical costs related to a personal injury judgment secured by recipient of aid); *Inhabitants of Town of Orrington*, 46 A.2d at 407 (construing a statute as not relieving townspeople of cost of assistance of an indigent); *Mary Lanning Mem'l Hosp.*, 101 N.W.2d at 516 (ruling county not liable to hospital for unapproved emergency treatment of an indigent); *Hogan*, 54 N.E.2d at 782-83 (ruling wife not liable for aid received by husband).

Finally, several cases where the denial of welfare benefits was sustained contain language suggesting that state courts would be more sympathetic to the rights of the poor in other circumstances. *See Moore*, 660 A.2d at 747 (noting that petitioners were demanding aid from the state "irrespective of the availability of food and shelter from family, friends, charitable organizations, religious institutions, and other community sources"); *Bullock*, 865 P.2d 205 ("The result herein does not mean that there is no point at which reduction in benefits and increases in eligibility requirements would ever be violative of . . . the Kansas Constitution."); *Conklin*, 730 P.2d at 651 ("SSI-ineligible spouses' financial needs are already addressed by the state supplement to SSI.").

³⁴³ Not surprisingly, given the language in the state constitution, the New York bench has been particularly solicitous of welfare rights. *See, e.g., Minino v. Perales*, 589 N.E.2d 385 (N.Y. 1992) (holding that welfare programs cannot discriminate against aliens); *Tucker*, 371 N.E.2d at 452 (holding that the legislature cannot constitutionally "refus[e] to aid those whom it has classified as needy"); *Lee*, 373 N.E.2d at 252 (holding that the state cannot constitutionally adopt programs which result in "the aged, disabled and blind . . . surviv[ing] on lesser amounts than are granted to other needy persons"); *Palmer v. Cuomo*, 503 N.Y.S.2d 20 (App. Div. 1986) (holding that children in foster care have a constitutional right to the training necessary to function on their own as adults); *Toia v. Schueler*, 389 N.Y.S.2d 414, 414 (App. Div. 1976) ("A county may not evade its obligation to provide for the welfare needs of its residents by the County Legislature's refusal to allocate funds therefor.").

The New York judiciary has asserted that elected officials have substantial, but not absolute, discretion to determine who is needy and what benefits are adequate. *See Bernstein v. Toia*, 373 N.E.2d 238, 244 (N.Y. 1977) (ruling that state officials need not consider individual circumstances of each aid recipient); *Lovelace v. Gross*, 605 N.E.2d 339, 343 (N.Y. 1992) (ruling that grandparents' income may be considered in calculation of aid); *see also Ramsey & Braveman, supra* note 231, at 1622-24 (discussing how the New York judiciary has interpreted article XVII of the state constitution).

For a sample of cases protecting welfare rights in other states, see *L.T. v. New Jersey Dep't of Human Servs.*, 633 A.2d 964, 970 (N.J. 1993) (ruling that state agencies "have the responsibility to see that the homeless receive shelter"); *Williams v. Dep't of Human Servs.*, 561 A.2d 244 (N.J. 1989) (addressing housing rights); *Ellis*, 285 S.W.2d at 634; *Elliott*, 280 N.W.2d at 637; *Collins*, 81 N.W.2d at 4; *Butte Community Union v. Lewis*, 712 P.2d 1309,

optimistic commentators even think that "a new period of judicial [activism] appears to be unfolding," one that "is based on state rather than federal law and is taking place in state rather than federal courts."³⁴⁴ Education has been a particularly fruitful source of litigation. Numerous state courts have rejected *Rodriguez* and found a requirement of equal educational funding in the state constitution.³⁴⁵ Courts in Massachusetts have ordered state officials to increase welfare benefits substantially to ensure that persons on state assistance can afford adequate housing.³⁴⁶ At least one state judiciary may be moving towards finding a state constitutional right to adequate shelter.³⁴⁷ These examples

1311 (Mont. 1986) (ruling that "a classification which abridges welfare benefits" must be subject to "heightened scrutiny under an equal protection analysis," and, on that ground, striking down laws discriminating against younger persons needing assistance); *Butte Community Union v. Lewis*, 745 P.2d 1128 (Mont. 1987) (holding that state welfare programs cannot constitutionally discriminate against persons without dependent children). Both Montana decisions were overturned by a state constitutional amendment. See MONT. CONST. art. XII § 3 ("The legislature may provide such economic assistance . . . for those who . . . are determined by the legislature to be in need."); *Harper v. Greely*, 763 P.2d 650, 651-53 (Mont. 1988) (upholding sufficiency of referendum to amend the Montana Constitution); see also Ramsey & Braveman, *supra* note 231, at 1627-28 (discussing the Montana experience).

³⁴⁴ Sard, *supra* note 292, at 367-68; see *id.* at 282-88; Edelman, *supra* note 119, at 55-60; Ratnesar, *supra* note 292, at 17.

³⁴⁵ See *Opinion of the Justices*, 624 So. 2d 107 (Ala. 1993); *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976); *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ken. 1989); *McDuffy v. Secretary of the Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Helena Elem. Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Tennessee Small Sch. Sys. v. McWhorter*, 851 S.W.2d 139 (Tenn. 1993); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978); *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979); *Washakie County Sch. Dist. No. One v. Herschler*, 606 P.2d 310 (Wyo. 1980).

The system of funding education in North Dakota survived judicial challenge only because the state constitution required four of the five justices on the state supreme court to support any ruling that strikes down a state law. *Bismarck Pub. Sch. Dist. No. 1 v. State*, 511 N.W.2d 247 (N.D. 1994).

For the most recent scorecard on how state judiciaries have responded to attacks on how public education is funded, see *Roosevelt*, 877 P.2d at 814; see also Edelman, *supra* note 119, at 57-60.

³⁴⁶ See *Massachusetts Coalition for the Homeless v. Secretary of Human Servs.*, 511 N.E.2d 603 (Mass. 1987) (directing the Department of Public Welfare to notify the legislature when AFDC funds were insufficient to enable parents to raise children in their own home).

³⁴⁷ See *Jiggetts v. Grinker*, 553 N.E.2d 570, 572 (N.Y. 1990) (claiming that in light of

demonstrate the practical importance of advancing constitutional arguments for welfare rights, even when both federal precedent and federal politics indicate that such claims will not be accepted by federal courts.

Present liberal constitutional priorities seem particularly questionable from a strategic perspective if, as may seem appropriate, the rough rule of three is supplemented with a rough rule of six. Liberal constitutional theorists who abandon constitutional claims that will not appeal to at least three justices should, for similar reasons, de-emphasize constitutional claims that have already convinced at least six justices. This rough rule of six acquires special force when the ranks of the dissenters are not likely to be augmented in the near future. Given the present 6–3 Supreme Court majority in favor of retaining *Roe*, and President Clinton's strong pro-choice sentiments, little danger exists that abortion rights will be subject to federal judicial attack in the near future. Therefore, the central strategic question liberal constitutional theorists should presently ask is not which arguments will best retain *Roe*, because any competent defense will probably do. Rather, pro-choice constitutionalists should detail the other rights that a court committed to *Roe* might be persuaded to protect. The rough rule of three may still rule out a renewed emphasis on welfare rights. Nonetheless, liberals can hope that Justices Breyer, Ginsburg, and at least one other Clinton appointee will engage in something more than a mopping up operation that merely expands abortion rights further. The standard defenses of *Roe*, unfortunately, suggest that the next frontiers for liberal constitutional theory are other liberties associated with the sexual revolution and the right to die³⁴⁸—causes of little interest to most poor people.³⁴⁹

Liberal constitutional theorists might justify their continued emphasis on abortion rights by correctly noting that the rough rule of six fails to recognize

the state constitution, the statute in question should be interpreted as requiring state officials "to establish shelter allowances that bear a reasonable relation to the cost of housing"); *McCain v. Koch*, 511 N.E.2d 62, 63 (N.Y. 1987) (holding that courts in New York are constitutionally authorized to order agencies providing "emergency housing for homeless families with children, to provide housing which satisfies minimum standards of sanitation, safety and decency"); see also *Doe v. Dinkins*, 600 N.Y.S.2d 939 (App. Div. 1993) (invoking state constitution in support of a court ruling requiring state officials to improve conditions at homeless shelters).

³⁴⁸ See *TRIBE & DORF*, *supra* note 33, at 55–60, 117; *DWORKIN*, *supra* note 25, at 179–241.

³⁴⁹ The most popular defense of abortion rights during the 1960s, arguments emphasizing how the law in practice was granting more affluent citizens a de facto right to terminate pregnancies, could be applied to other situations where law enforcement officials were systematically treating rich citizens better than the poor. See *GRABER*, *supra* note 36, at 116–17.

how volatile American politics has become.³⁵⁰ The partisan composition of each branch of government has changed in the recent past and may change again in the near future. During the 1980s, pro-life presidents battled an increasingly pro-choice Congress. Two years after installing a President who favored legal abortion, Americans elected a mostly pro-life Congress.³⁵¹ This situation is hardly stable. Prominent political scientists agree that "it's more possible for a shock to flip control of the Congress today than it was 10 or 12 years ago," and, at present, these experts recognize, "there is not a [durable] working majority for either party" in any branch of government.³⁵² Constitutional theorists concerned with future electoral trends should also recognize that political prognosticators have had a particularly bad record divining the course of American reproductive politics. Pundits pronounced *Roe* dead immediately before *Casey*, and then prematurely buried the pro-life movement after the 1992 election. Two years later, the Christian Coalition demonstrated renewed political strength and prominent Republican strategists began looking for opportunities to place the recriminalization of abortion back on the political agenda.³⁵³ Social conservatives did not fare as well in the 1996 election. Nevertheless, given how quickly pro-life forces have regrouped after other defeats, liberal constitutional theorists are well advised to ignore the rough rule of six and sharpen their defenses of *Roe*.

The same criticism of the rough rule of six, however, can be made of the rough rule of three. Americans in the near future may witness a strengthened Christian Coalition committed to banning abortion. The same future, however, may witness the reemergence of a powerful political movement for national health care or a strengthened union movement dedicated to reinvigorating the

³⁵⁰ Steve Rosenstone, Roy Behr, and Edward Lazarus provide a particularly compelling example of how unstable American electoral politics has become. They note that:

[A] year before the primary season got rolling, few observers would have given much credence to the idea that in 1992 a third party candidate would capture nearly 20 percent of the presidential vote. In fact it is only a slight exaggeration to say that [in February 1991], few observers thought that *any* candidate other than President George Bush would garner 20 percent of the vote.

STEVEN J. ROSENSTONE ET AL., *THIRD PARTIES IN AMERICA* 233 (2d ed. 1996).

³⁵¹ See Fred Barnes, *Life of the Party*, THE NEW REPUBLIC, Dec. 5, 1994, at 10.

³⁵² *Split Government Not Expected to Get Much Done, Election Watchers Say*, STAN. REP., Nov. 13, 1996, at 5 (quoting David Brady, John Ferejohn, and Douglas Rivers).

³⁵³ See George Weigel & William Kristol, *Prudence, Principle, and Abortion*, WASH. POST, Aug. 30, 1994, at A21 ("[T]he goal of pro-life Republican action should be unequivocal: 'an America in which every unborn child is protected in law and welcomed in life.'").

welfare state. An administration in which labor and health care activists play a major role might staff the federal courts with Rawlsian liberals predisposed to be sympathetic to constitutional arguments on behalf of rights to certain basic necessities. Hence, those political uncertainties which counsel liberals against de-emphasizing abortion rights should also counsel liberals against taking welfare rights off the constitutional table.

No one can determine with any degree of certainty which direction American politics will take in the near future. Certainly, constitutional theorists have had no better track record than most citizens making short term political predictions. In relatively volatile political times, therefore, liberals (and conservatives) should simply make the best arguments they can for those rights they believe the Constitution protects, leaving to the future how receptive courts will be to those claims. Attorneys considering how to frame appeals to the present Supreme Court should, of course, keep the present composition of the federal bench in mind. Such strategic concerns should play a much smaller role for constitutional theorists committed to more long-term projects. "Lawyers ought to try to avoid creating a new *Plessy v. Ferguson*," Jack Greenberg reminds us, "[b]ut very often, there is no effective way to know how the Court will decide certain issues without trying."³⁵⁴

C. Constitutional Considerations

The last strategic failing of the rough rule of three (and six) highlights a more fundamental constitutional problem with that practice: constitutional theory as an intellectual enterprise focuses on those constitutional rights that Americans have, and is relatively unconcerned with whether the Supreme Court or any other constitutional authority is likely to protect those rights tomorrow or the next day. Americans, proponents of aspirational methods of constitutional exegesis realize, must "interpret and apply [constitutional] provisions in light of our best understanding of an ideal state of affairs adumbrated by those provisions."³⁵⁵ Constitutional theories too tethered to strategic considerations or recent precedent obliterate this aspirational dimension of American constitutionalism by conflating the best vision of the constitutional order with the best results that can be gotten out of the Rehnquist Court. Liberal constitutional visions will remain vibrant, therefore, only if theorists who believe that the American constitutional order, at its best, would guarantee to all citizens the basic necessities of life, repeatedly say so. Decisions concerning when, how, and where to press those constitutional claims are questions best directed at political activists and litigators in the field,

³⁵⁴ GREENBERG, *supra* note 52, at 38.

³⁵⁵ SOTRIOS A. BARBER, *supra* note 41, at vii.

not constitutional theorists in the academy.

No sound reasons exist for fearing that the promotion of progressive constitutional aspirations will result in the constitutionalization of novel, bizarre, or unpopular rights. Constitutional and political arguments do not come from out of nowhere. As numerous scholars recognize, successful claims of any sort rely heavily on existing social practices and modes of justification. Broader ideological forces inevitably limit the constitutional arguments liberals (and conservatives) choose to make and the arguments they are capable of choosing.³⁵⁶ Persons making claims of constitutional right typically attempt to demonstrate that their assertions are not novel or bizarre by providing evidence that society already recognizes the liberty in question or recognizes some closely analogous liberty.³⁵⁷ Proponents of the constitutional right to abortion sought to establish their mainstream credentials in *Roe* by claiming that the common law recognized a right to an abortion,³⁵⁸ that states were liberalizing access to abortion,³⁵⁹ and that abortion rights were analogous to the right to birth control that the Supreme Court had previously declared a constitutional

³⁵⁶ For a more detailed elaboration of this point, see Quentin Skinner, *Some Problems in the Analysis of Political Thought and Action*, 2 POL. THEORY 277, 299 (1974); see also JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 6 (1984); SANFORD LEVINSON, CONSTITUTIONAL FAITH 156 (1988); MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 219-20 (1991).

³⁵⁷ See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978) (historical recognition of the right to marriage); *Moore v. East Cleveland*, 431 U.S. 494, 500-01 (1977) (finding that a grandmother's right to live with her grandchildren was sufficiently analogous to other family rights the Court had recognized to warrant constitutional protection); *Poe v. Ullman*, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting) ("conclusive, in my view, is the utter novelty of the enactment" banning the use of contraception by married people). Social recognition of rights can be formal or informal. The Court in *Mapp v. Ohio*, 367 U.S. 643 (1961), noted that most states had already adopted the exclusionary rule in criminal cases. *Id.* at 651-52; see also *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (noting that "[t]wenty-two states, as friends of the Court" supported claims that defendants in felony cases had a constitutional right to state-appointed counsel). The concurring opinions in *Furman v. Georgia*, 408 U.S. 238 (1972), observed that although the laws of most states permitted juries to impose capital punishment, that sanction was hardly ever inflicted. *Id.* at 291-95 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 311-13 (White, J., concurring); *id.* at 364-66 (Marshall, J., concurring); *id.* at 251-52, 255-56 (Douglas, J., concurring) (noting that affluent citizens enjoy a de facto right not to be executed); see also *Poe*, 367 U.S. at 533 (Harlan, J., dissenting) (noting that most citizens had a de facto right to use birth control).

³⁵⁸ See *supra* notes 218-19 and accompanying text.

³⁵⁹ See 410 U.S. 113, 143-47, 154-55 (1973).

liberty.³⁶⁰ Opponents of *Roe* challenged these claims, particularly the analogy between birth control and abortion.³⁶¹ Still, the modalities of constitutional argument ensure that debates over abortion, welfare, and other claims of constitutional right are not over whether a concededly novel or bizarre liberty should be accorded constitutional status,³⁶² but whether the right under debate is sufficiently rooted in American political and legal practice to warrant constitutional recognition.³⁶³

Fears that the Supreme Court will protect novel, bizarre, or unpopular rights are similarly groundless. Supreme Court justices do not come from out of nowhere. They are nominated by elected executives and confirmed by elected legislators. Because some citizens vote against representatives who previously supported a controversial judicial nominee,³⁶⁴ the mere perception that a jurist is out of the mainstream, however mistaken, may be enough to prevent their

³⁶⁰ *Id.* at 152–53; see *Transcript of Edited and Narrated Arguments in Roe v. Wade, in MAY IT PLEASE THE COURT: THE MOST SIGNIFICANT ORAL ARGUMENTS MADE BEFORE THE SUPREME COURT SINCE 1955*, at 349 (Peter Irons et al. eds., 1993).

³⁶¹ See, e.g., Ely, *Crying Wolf*, *supra* note 26, at 929–30 (1973); Richard A. Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 170 (1974); MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* 174–75 (1988). Opponents of *Roe* also challenge pro-choice claims that the common law recognized abortion rights. See, e.g., John Finnis, “Shameless Acts” in *Colorado: Abuse of Scholarship in Constitutional Cases*, 7 ACAD. QUESTIONS 10, 10–19 (1994); JOHN T. NOONAN, JR., *A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES* 5–7 (1979).

³⁶² See *Poe*, 367 U.S. at 542 (Harlan, J., dissenting) (“A decision of this court which radically departs from [tradition] could not long survive.”).

³⁶³ Conservative and liberal justices in Fifth Amendment takings cases debate whether the common law supports a constitutional rule requiring compensation whenever a state law forbids “the erection of any habitable or productive improvements on . . . land.” *Lucas v. South Coastal Council*, 505 U.S. 1003, 1031 (1992). Compare the majority opinion in *Lucas*, *id.*, with its dissent, *id.* at 1055–56 (Blackmun, J., dissenting) (“It is not clear from the Court’s opinion where our ‘historical compact’ or ‘citizens[.]’ understanding’ comes from, but it does not appear to be history.”). In Fourteenth Amendment cases liberals and conservatives reverse sides and debate whether engaging in sodomy is sufficiently analogous to other privacy rights the Court has recognized to warrant constitutional protection. Compare the majority opinion in *Bowers v. Hardwick*, 478 U.S. 186, 190–91 (1986) (“none of the rights announced in those [past] cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy”), with its dissent, *id.* at 203–08 (Blackmun, J., dissenting) (citing precedent in support of the claim that “the case before us implicates both the decisional and spatial aspects of the right to privacy”).

³⁶⁴ See L. Marvin Overby et al., *Courting Constituents? An Analysis of the Senate Confirmation Vote on Justice Clarence Thomas*, 86 AM. POL. SCI. REV. 87 (1992); Robin M. Wolpert & James G. Gimpel, *Information, Recall, and Accountability: The Electorate’s Response to the Clarence Thomas Nomination*, 22 LEGIS. STUD. Q. 4 (1997).

appointment to the federal bench. The confirmation process set out in Article II of the Constitution almost guarantees that federal judges will accept only those claims of constitutional right that are supported by a substantial segment of the (educated) population. Good reasons exist for objecting to the American practice of judicial review.³⁶⁵ Both institutional structure and history, however, should allay concerns that the federal bench will be out of touch with legislative and popular majorities for any length of time. As Robert Dahl notes, it is "unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court justices would long hold to norms of right or justice substantially at odds with the rest of the political elite."³⁶⁶ Whatever one may think of *Roe* as an original matter, that decision would have been overruled had the Democrats not recaptured the Senate in 1986 and the Presidency in 1992. Should every present member of the federal bench suddenly convert to socialism, the Supreme Court will continue protecting welfare rights only if progressive forces gain the political strength necessary to block adverse judicial appointments.³⁶⁷

Constitutional theorists who think recent precedent sharply limits the rights that should receive constitutional sanction may, in a misguided effort to reduce constitutional change, threaten more fundamental characteristics of the American constitutional enterprise. Enduring constitutions must have some mechanism that enables them to respond to political change.³⁶⁸ Some texts stay abreast of the times by providing undemanding conditions for formal amendment. Constitutions that cannot easily be amended formally are typically interpreted loosely. "A relatively difficult amendment process," Donald Lutz points out, "will tend to be associated with a broad theory of judicial construction."³⁶⁹ Given the extraordinary procedures for formal amendment set out in Article VII, the Constitution of the United States has probably survived

³⁶⁵ See, e.g., Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 412-15 (1997) (defending an "anticonstitutionalist" position).

³⁶⁶ Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 291 (1957). For other works reaching similar conclusions, see THOMAS MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* (1989); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 578, 677-80 (1993); Graber, *supra* note 301, at 35; William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993).

³⁶⁷ Moreover, judicial protection of welfare rights would influence policy only if elected officials and their appointees choose to implement judicial decisions.

³⁶⁸ See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 242 (Sanford Levinson ed., 1995).

³⁶⁹ *Id.* at 273; see *id.* at 265-67.

more than two hundred years only because constitutional authorities have adopted interpretive principles that enable "any political question [that] arises" to be "resolved, sooner or later, into a judicial question."³⁷⁰ The constitutional tradition we celebrate, in other words, is one that facilitates the expression of basic political aspirations in constitutional terms.³⁷¹ A practical ban on efforts to constitutionalize rights that prominent political movements believe fundamental might well require the introduction of some novel, perhaps bizarre, constitutional mechanism for accommodating political change.³⁷² Hard to amend constitutions that are strictly construed may prosper in theoretical zoos, but they do not appear to survive long in the political wilds.

Liberal (or conservative) constitutional theories less tethered to recent precedent adjust rather than abandon traditional doctrinal arguments. Claims that the Constitution protects the right to basic necessities (or any other right) do not entail a judicial obligation to overrule, in one fell swoop, every hostile constitutional ruling. When justices become convinced that a recent line of decisions is constitutionally mistaken, institutional considerations and the principle of *stare decisis* will typically indicate that the better course of action in the short run is for justices to narrow the scope of cases now perceived as erroneously decided while building an alternative body of precedent that points in some other constitutional direction. In most cases, the Supreme Court should announce the existence of a hitherto judicially unrecognized constitutional right, such as the right to be provided with basic necessities, only after a solid precedential foundation for that right has been established. Such an incremental process not only allows justices to see how their policies work, but gives a polity committed to a different constitutional vision the time necessary to appoint other jurists dedicated to reversing the judicial trend.

Constitutional theorists should regard precedent as firmly entrenched in the constitutional order only when a broad social consensus exists that the judicial decision was either constitutionally correct, morally just, or too embedded in our present political regime to be abandoned. As Abraham Lincoln asserted with respect to *Dred Scott v. Sandford*,³⁷³ judicial rulings should be granted authoritative constitutional status only "when fully settled" both with respect to

³⁷⁰ 1 DE TOCQUEVILLE, *supra* note 114, at 290.

³⁷¹ See SANFORD LEVINSON, *supra* note 356, at 191–94 (1988).

³⁷² See STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM 28–30, 41 (1996) ("The experience of American constitutionalism shows that you can maintain the written quality of the constitution only at the expense of abandoning the framework character of the document and you can maintain the framework character of the constitution only by abandoning the idea that all important constitutional change must occur through formal amendment.").

³⁷³ 60 U.S. 393 (1857).

"the particular cases decided" and "the general policy of the country."³⁷⁴ *Marbury v. Madison*³⁷⁵ and *Brown v. Board of Education*³⁷⁶ meet this standard, even if, as some scholars have suggested, *Brown* was wrong when handed down.³⁷⁷ These decisions were extremely controversial for long periods of time. Americans of almost all political persuasions, however, are now persuaded that judicial review and racial equality are central to our constitutional order. By comparison, no consensus exists that judicial decisions protecting abortion rights or rejecting welfare rights are constitutionally correct, morally just, or too embedded in the present political regime to be abandoned. Hence, neither *Roe* nor *Dandridge* qualifies for the same constitutional status as *Marbury* or *Brown*. Just as critics of *Roe* continue insisting that legal abortion is not central to our constitutional order, so liberals should continue insisting that welfare rights are central to our constitutional order.³⁷⁸ By conceding that the Constitution does not guarantee all persons certain basic necessities, Dworkin, Tribe, and other liberal constitutionalists are taking a crucial step in the process that will result in *Dandridge* being accorded the same constitutional status as *Brown*.³⁷⁹ Such a concession is warranted only if liberal constitutional theorists have concluded that welfare rights are not central to our constitutional order. Progressive commitments to the constitutional rights of the poor should not be abandoned merely because the left is presently experiencing a run of adverse decisions.

The original members of the movement for welfare rights knew that their task was to alter some very entrenched attitudes towards poverty. Edward Sparer and his allies did not expect to be successful in the immediate future. They hoped to make the claim that the Constitution protected welfare rights familiar and increasingly acceptable to Americans. For better or worse, their political window of opportunity closed before the case for constitutional rights

³⁷⁴ 2 ABRAHAM LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN 401 (Roy P. Basler ed., 1953).

³⁷⁵ 5 U.S. 137 (1803).

³⁷⁶ 347 U.S. 483 (1954).

³⁷⁷ See ROGERS M. SMITH, *The Inherent Deceptiveness of Constitutional Discourse: A Diagnosis and Prescription*, in NOMOS XXXIX: INTEGRITY AND CONSCIENCE (Ian Shapiro ed., forthcoming 1997); Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-35 (1959).

³⁷⁸ See 2 LINCOLN, *supra* note 374, at 401-10 (explaining why in 1857 the *Dred Scott* decision should not be treated as an authoritative constitutional precedent).

³⁷⁹ The Supreme Court's 5-4 decision in *Casey* could not entrench *Roe* as a constitutional precedent. A decision by the Republican party to abandon its pro-life platform, however, would go a long way towards demonstrating that a broad consensus now exists that legal abortion is a central feature of our constitutional order.

disseminated among the constitutional elite.³⁸⁰ "One factor in the failure of the litigation strategy," Martha Davis notes, "was likely the short duration of the organized welfare rights movement."³⁸¹ Samuel Krislov agrees that "[t]here was not enough time for the necessary analysis, criticism and refinement of the 'right to life' doctrine. There was not enough time to permit a judicial acceptance of a new constitutional doctrine[,] . . . nor was there time to obscure the fine line between judicial and legislative rulemaking authority."³⁸² Still, Krislov notes, "[e]ven within this short time frame, . . . a number of federal district and courts of appeals judges accepted the right to life theory, suggesting that a more measured approach—including law review articles and simultaneous litigation based on state constitutions—might indeed have been more successful."³⁸³

Contemporary advocates for welfare rights recognize that constitutional arguments cannot be confined to what is possible today. Peter Edelman publicly admits that "the present Supreme Court will not adopt" his claim that "a constitutional right to a 'survival' income" exists.³⁸⁴ Nevertheless, he maintains, "the intellectual groundwork for judicial participation should be laid anyway against the day when a more amenable Court is in place."³⁸⁵ By taking constitutional welfare rights off the agenda in order to make abortion rights arguments more palatable to conservative justices, liberal constitutional theorists risk convincing future liberal justices that no judicially enforceable constitutional rights to basic necessities exist. As a result, constitutional welfare rights may not be on the judicial agenda when a window of opportunity reopens. Whether time will permit welfare rights to get back on that agenda is an open question.

D. *Perpetuating Constitutional Injustice*

Too rigid an adherence to recent precedent not only corrupts liberal constitutional theory by prematurely taking certain rights off the table, but also by conscripting liberal participation in practices for identifying constitutional rights that may subvert the American constitutional order. The rough rule of

³⁸⁰ See GREENBERG, *supra* note 52, at 30 ("The tenor of political rhetoric has shifted all too swiftly from solicitude for the poor in the 1960's to harsh calls for restricting eligibility and winnowing welfare rolls.").

³⁸¹ DAVIS, *supra* note 53, at 143.

³⁸² Samuel Krislov, *The OEO Lawyers Fail to Constitutionalize a Right to Welfare: A Study in the Uses and Limits of the Judicial Process*, 58 MINN. L. REV. 211, 245 (1975).

³⁸³ *Id.* at 239; see DAVIS, *supra* note 53, at 143.

³⁸⁴ Edelman, *supra* note 119, at 3.

³⁸⁵ *Id.*

three purports to advance liberal constitutional goals by selecting from the full universe of rights liberals believe the Constitution protects—rights that liberals believe the present conservative Court might be persuaded to protect. Constitutional justice, however, may not be so simply maximized. Decisions to protect some liberties but not others create independent rights violations when no principled distinction exists between protected and unprotected rights. Ronald Dworkin properly condemns “checkerboard” laws—measures that randomly allocate fundamental freedoms—because an arbitrary distribution of a constitutional liberty is often worse than the blunt refusal to recognize the right in question.³⁸⁶ For example, a state which gave only affluent white women the right to terminate their pregnancies would protect more abortion rights than a state which totally banned all abortions. Nonetheless, this increased protection violates our social commitment to equality under law. Such arbitrary policies are sometimes necessary, but no one thinks they are desirable.³⁸⁷

Equality under law may also be violated by the total package of rights a state recognizes. No principled distinction exists between protected and unprotected freedoms when constitutional authorities cannot explain why they rely on certain general principles and interpretive methods when adjudicating some claims of constitutional right that they reject when adjudicating other claims of constitutional right. A constitutional order is unjust, Dworkin properly insists, when a state “must endorse principles to justify part of what it has done that it must reject to justify the rest.”³⁸⁸ If the right to abortion and the right to engage in homosexual sodomy both follow logically from a more general right of privacy, then a society whose constitution is interpreted as protecting that general right of privacy should not keep abortion legal and ban homosexual sodomy.³⁸⁹ At the very least, Supreme Court justices in gay rights cases should not reject general constitutional rights to privacy without explaining why they are still protecting abortion. Unprincipled packages of constitutional rights are particularly egregious when constitutional authorities recognize only those rights of interest to more privileged citizens, turning a deaf ear to the equally

³⁸⁶ DWORKIN, *EMPIRE*, *supra* note 80, at 178–84.

³⁸⁷ Dworkin points out that persons who are convinced that abortion is murder might support laws prohibiting women born in certain months from having abortions when legal abortion is the only alternative. These opponents of legal abortion recognize, however, that such laws violate constitutional integrity. *See id.* at 182–83.

³⁸⁸ *Id.* at 184 (“Integrity is flouted . . . whenever a community enacts and enforces different laws each of which is coherent in itself, but which cannot be defended together as expressing a coherent ranking of different principles of justice or fairness or procedural due process.”).

³⁸⁹ Unless, of course, constitutional authorities reject the claim that the right to homosexual sodomy follows logically from that more general right of privacy.

valid constitutional arguments of less fortunate individuals. One particularly disturbing feature of Robert Bork's writings, for example, is that the originalist doctrines that he insists refute the constitutional demands black Americans made for desegregated schools in Washington, D.C., are instantly discarded when white citizens challenge federal affirmative action programs.³⁹⁰

Liberal constitutional theorists committed to constitutional equality should not settle for what, from a liberal perspective, may be an utterly random set of rights merely because those are the only constitutional rights that sitting justices might be persuaded to protect. Reliance on something like the rough rule of three can be justified within liberal theory only if that standard yields a coherent, if imperfect, vision of the constitutional order. "If there must be compromise because people are divided about justice," Dworkin writes, "it must be compromise about which scheme of justice to adopt rather than a compromised scheme of justice."³⁹¹ Thus, constitutional commentators and authorities (liberal or otherwise) who value consistency should not adjust their theories to fit existing judicial preferences when doing so will either promote the arbitrary collection of liberties that happen to appeal to those in power or, worse, help legitimate discriminatory distinctions between constitutional rights.

This constitutional obligation to avoid unprincipled collections of rights seems a particularly compelling reason for liberals to forswear using the rough rule of three at present. Many critics charge that a significant majority of sitting justices are unwilling to protect the constitutional rights of the poor even when those rights cannot be distinguished in principle from the constitutional rights of more affluent citizens that federal courts presently protect.³⁹² If this accusation is correct, then any constitutional theory closely tied to recent precedent will both mimic and perpetuate that injustice.

³⁹⁰ Bork insists there was "no way to justify the Warren Court's revision of the Constitution" in *Bolling v. Sharp*, 347 U.S. 497 (1954), because "the equal protection clause . . . applied only to the states; no similar clause applied to the federal government." BORK, *supra* note 117, at 83-84. He nevertheless concludes that the Court's failure in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), overruled by *Adarand Constr., Inc. v. Peña*, 515 U.S. 200 (1995), to declare unconstitutional a federal law "giving preferences in the award of broadcasting licenses to minorities" was "a disaster for constitutional law." BORK, *supra* note 117, at 359, 361. At no point in his diatribe against affirmative action does Bork examine the intentions of the persons responsible for the Fourteenth Amendment. This omission is particularly significant in light of the numerous racial preferences passed by the Congress during Reconstruction. See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

³⁹¹ DWORKIN, EMPIRE, *supra* note 80, at 179.

³⁹² See *infra* Part III.D.1.

1. *Public Values and Elite Interests in Contemporary Law*

Liberal commentators frequently complain that the present Court is only sympathetic to rights claims that serve elite interests, that when examining recent judicial decisions, "an asymmetric pattern strong suggestive of class emerges."³⁹³ This bias seems most apparent in free speech cases. Steven Loffredo notes that the Rehnquist and Burger Courts "[have] displayed exceptional sensitivity toward elite communicative modes such as corporate campaign financing, corporate speech, large scale political expenditures, and, to a lesser extent, prerogatives of the mass media."³⁹⁴ The same Justices have "been markedly inhospitable toward distinctive plebeian modes of political expression and participation, like the public display of posters, picketing, residential distribution of handbills and demonstrations in public parks."³⁹⁵ Mark Tushnet's analysis of early Burger Court rulings on Fourteenth Amendment issues observes a similar bias. The judicial majority, he charges, "is willing to invoke the equal protection clause to invalidate legislation that might harm its friends and neighbors but unwilling to strike down legislation that harmed only the poor."³⁹⁶ Privacy is a third area where the present Court has been accused of "end[ing] at the boundary of their . . . social class."³⁹⁷ For example, abortion is protected, but not the right to a state funded abortion.³⁹⁸

³⁹³ Loffredo, *supra* note 85, at 1364. *See generally* ELY, THEORY, *supra* note 26, at 58–59 (noting "a systematic bias in judicial choice of fundamental values, unsurprisingly in favor of the values of the upper-middle, professional class").

³⁹⁴ Loffredo, *supra* note 85, at 1364.

³⁹⁵ *Id.* at 1364–65. *Compare* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (finding a criminal statute prohibiting corporations from financing a campaign for a personal income tax referendum to be in violation of the First Amendment), and Buckley v. Valeo, 424 U.S. 1 (1976) (invalidating provisions of Federal Elections Campaign Act that caps candidates' personal campaign expenditures on grounds that such provisions abridge political expression), and Pacific Gas & Electric Co. v. Public Utils. Comm'n, 475 U.S. 1 (1986) (overturning decision of state utilities commission requiring public utilities to allocate advertising space on billing envelopes), with Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding local ordinance prohibiting the posting of campaign posters on public property), and Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (upholding regulation prohibiting overnight camping in Lafayette Square by political demonstrators), and Frisby v. Schultz, 487 U.S. 474 (1988) (upholding "content neutral" anti-picketing ordinance). *See generally* GRABER, *supra* note 356, at 189–96.

³⁹⁶ Tushnet, *supra* note 100, at 180.

³⁹⁷ Karst, *supra* note 55, at 59.

³⁹⁸ *See id.* at 59; Paul Brest, *Who Decides*, 58 S. CAL. L. REV. 611, 668 (1985); *see also* Thomas C. Grey, *Eros, Civilization and the Burger Court*, 43 L. & CONTEMP. PROBS. 83, 88–90 (1980); Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial*

If the Rehnquist and Burger Courts are guilty as charged with exhibiting special solicitude for class interests, then liberals who rely on the rough rule of three are likely to become accomplices to this constitutional crime. At best, a liberal constitutional theory closely attuned to recent precedent would protect a different, perhaps more accurate, set of liberties that advance very much remembered middle and upper-middle class concerns. Such biases may already be infecting progressive legal thought. The rough rule of three probably explains why liberal constitutional theorists continue to call on the federal judiciary to sustain affirmative action programs and strike down laws banning any consensual expression of adult sexuality. Good reasons exist for thinking that judicial policy in these areas may change in the near future, particularly should one of the more conservative justices on the Rehnquist Court be replaced by a Clinton appointee. Four justices dissented when the Supreme Court in 1995 declared unconstitutional a federal affirmative action policy.³⁹⁹ Furthermore, the Court's 1996 decision in *Romer v. Evans*,⁴⁰⁰ striking down a law directed at homosexuals, suggests that the judicial majority may already be rethinking whether persons have a constitutional right to engage in private sodomy with consenting adult partners.⁴⁰¹ The main beneficiaries of decisions overruling *Adarand v. Peña*⁴⁰² and *Bowers v. Hardwick*,⁴⁰³ however, will be minority business owners and a relatively affluent homosexual community.⁴⁰⁴ Affirmative action does not touch the lives of most poor persons of color, who frequently live in neighborhoods where there are few white persons and even fewer jobs.⁴⁰⁵ Similarly, most poor people are far more concerned with putting bread on the table than liberating their sexual energies. Unfortunately, given the low level of interest in welfare rights among the more liberal members of the present bench and the Clinton administration,⁴⁰⁶ the poor are likely to remain

Review, 64 U. COLO. L. REV. 975, 975-76, 987-89 (1993) (claiming that courts protect gender rights only when doing so advances the interests of white men).

³⁹⁹ See *Adarand Constr., Inc., v. Peña*, 518 U.S. 200 (1995). The dissenters were Justices Souter, Ginsburg, Breyer, and Stevens.

⁴⁰⁰ 116 S. Ct. 1620 (1996).

⁴⁰¹ Jeffrey Rosen, *The Agonizer*, THE NEW YORKER, Nov. 11, 1996, at 90.

⁴⁰² 518 U.S. at 200.

⁴⁰³ 478 U.S. 186 (1986).

⁴⁰⁴ See Stuart Elliott, *Big Marketers Are Divided on Issue of Homosexuality*, N.Y. TIMES, Feb. 23, 1994, at D1, D18 (noting "high education levels and relative affluence among gay customers"); Kenneth Sherrill, *On Gay People as a Politically Powerless Group*, in *GAY AND THE MILITARY: JOSEPH STEFFAN VERSUS THE UNITED STATES* 105-09 (Marc Wolinsky & Kenneth Sherrill eds., 1993).

⁴⁰⁵ See WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996).

⁴⁰⁶ See *supra* notes 1-9, 399-405 and accompanying text.

unwanted orphans in the American constitutional universe. Until that blessed day when several justices on the Court become more sympathetic to the rights of poor people, all that liberal constitutional theories structured by the rough rule of three will do is reproduce more progressive variations on the constitutional rights of the well-to-do.

Middle and upper-middle class citizens do have constitutional rights that should not be ignored by liberal constitutional theorists. The fact that gays and lesbians seem on average as economically well-off as their heterosexual counterparts⁴⁰⁷ provides no legitimate excuse for denying whatever fundamental rights they have to express their sexuality. The main liberal objection to the Burger and Rehnquist Courts' practices, however, is not that the justices always protect the wrong rights.⁴⁰⁸ Tushnet enthusiastically supports judicial decisions protecting the rights of women,⁴⁰⁹ even though he believes the justices saw those cases as "particularly concern[ing] their wives and friends."⁴¹⁰ Liberals object to the pattern of Rehnquist Court decisions. They believe that no principled distinction exists between cases where the Supreme Court protects rights that primarily advance elite interests and cases where the Supreme Court fails to protect rights that primarily advance the interest of poorer persons. The constitutional principles that justify protecting the rights of women, in this view, should compel the present federal judiciary to exhibit far greater judicial solicitude towards the rights of the poor.⁴¹¹ Unfortunately, liberal constitutional theory structured by the rough rule of three exhibits the same biases as Burger and Rehnquist Court practice. Again, the problem is not that liberals insist that *Roe* be affirmed and *Bowers* be overruled. Tribe, Dworkin, and others violate constitutional integrity by not providing a principled distinction between the fundamental human rights—abortion and homosexuality—they believe are also judicially enforceable constitutional rights and the fundamental human rights—livelihood—they insist are not judicially enforceable constitutional rights.

This failure has important institutional implications. Liberal theories infected with the same class biases as Rehnquist Court jurisprudence risk blurring the line between public values and elite interests that is at the heart of American constitutionalism and the practice of judicial review. No contemporary justification for the judicial power to declare laws unconstitutional, liberal or conservative, legitimates an institution that primarily

⁴⁰⁷ See Sherrill, *supra* note 400, at 105.

⁴⁰⁸ Few liberals agree with the way that the Rehnquist and Burger Courts treat affirmative action and interpret the takings clause of the Fifth Amendment.

⁴⁰⁹ See *Frontiero v. Richardson*, 411 U.S. 677 (1973).

⁴¹⁰ Tushnet, *supra* note 100, at 181.

⁴¹¹ See *supra* note 387 and accompanying text.

supports the lifestyles of the (fairly) rich and famous.

2. *Public Values and Elite Interests in American Constitutionalism*

The founders of the American constitutional order believed that a public good existed and that some persons were particularly well qualified to ascertain that public good. Well designed republics, in their view, relied on electoral schemes that facilitated the election of the best men (now people) and representational schemes that, while retaining popular control in the long run, permitted those men (now people) to exercise independent judgment on political issues.⁴¹² Madison, in particular, endorsed a strong trustee theory of representation. "The aim of every political constitution," he wrote, "is . . . first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society."⁴¹³ Fortunately, the American Constitution seemed well designed from that perspective. Ratification, John Jay declared, would guarantee that "the best men in the country will not only consent to serve, but also will generally be appointed to manage [the polity]."⁴¹⁴

The leading critics of Madisonian institutions either denied that a public good existed or, more typically, that some class of people were particularly well qualified to ascertain that public good. The anti-Federalists insisted that the persons responsible for the Constitution were not disinterested republicans, but interested landowners and speculators eager to form a national government that would serve their class interest. Gordon Wood's influential study of late eighteenth century American political culture notes how leading opponents of ratification consistently charged that the proposed constitutional regime "was aristocratically designed to 'arise the fortunes and respectability of the well-born few and oppress the plebeian.'"⁴¹⁵ In their view, "[t]here was . . . no

⁴¹² GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 106, 180, 189-90, 230, 253 (1992); GRIFFIN, *supra* note 372, at 15; Mark A. Graber, *Conflicting Representations: Lani Guinier and James Madison on Electoral Systems*, 13 CONST. COMMENTARY 291, 299-303 (1996).

⁴¹³ THE FEDERALIST NO. 57, at 350 (James Madison) (Clinton Rossiter ed., 1961).

⁴¹⁴ *Id.* NO. 3, at 43 (John Jay); *see id.* NO. 4, at 47; *id.* NO. 64, at 391 (explaining why the presidential appointment system will secure "those men only who have become the most distinguished by their abilities and virtue"); *id.* at NOS. 64, 68, at 396, 412 (John Jay, Alexander Hamilton) (explaining why the presidential selection system will result in the election of the best person); *id.* NO. 76, at 455, 458-59 (Alexander Hamilton). *See generally* EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 237-306 (1988); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 499-518 (1969).

⁴¹⁵ WOOD, *supra* note 412, at 255, quoting PROVIDENCE GAZETTE, Jan. 5, 1788.

disinterested gentlemanly elite that could feel 'sympathetically the wants of the people'" and speak for their 'feelings, circumstances, and interests.'"⁴¹⁶ Rather, "[t]hat elite had its own particular interests to promote."⁴¹⁷ Melancton Smith informed his fellow New Yorkers, "I do not mean to declaim against the great, and charge them indiscriminately from want of principle and honesty."⁴¹⁸ Madisonian institutions were faulty, Smith claimed, because Federalists failed to acknowledge that "[t]he same passions and prejudices govern all men."⁴¹⁹

Progressive era critics of the Constitution shared these anti-Federalist concerns with elites and the constitutional order. Charles Beard's *An Economic Interpretation of the Constitution of the United States* rejected the traditional view that "the struggle over the formation and adoption of the [Constitution] [was] a contest between sections ending in a victory of straight-thinking national-minded men over narrower and more local opponents."⁴²⁰ Instead, Beard claimed, "the men who favored the Constitution were affiliated with certain types of property and economic interest, and that men who opposed it were affiliated with other types."⁴²¹ Although Beard insisted that he "applie[d] no moralistic epithets to either party,"⁴²² the way in which he and other Progressive era thinkers characterized the ratification debate privileged the anti-Federalist interpretation of the Constitution as a vehicle for promoting elite interests. Commentators who describe late eighteenth century American politics as a "struggle between greater property and smaller property for control of the state,"⁴²³ clearly reject the Federalist claim that constitutional institutions are best understood as means for promoting the public good.

Significantly, both constitutional supporters and constitutional critics during the ratification debates agreed that the constitutional order would privilege elite opinion. Hence, contemporary claims that judicial opinions are likely to reflect

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* (quoting Melancton Smith and General Heath); see *id.* at 255-59; 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 106, at 17-18.

⁴¹⁸ Melancton Smith, Speeches by Melancton Smith, *reprinted in* 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 106, at 158.

⁴¹⁹ *Id.*

⁴²⁰ CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES xliii (1986).

⁴²¹ *Id.* at xlv. For similar interpretations of the ratification debates, see J. ALLEN SMITH, THE SPIRIT OF AMERICAN GOVERNMENT 29-39 (1965); VERNON L. PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT: VOLUME ONE: 1620-1800: THE COLONIAL MIND 271-326 (1927).

⁴²² BEARD, *supra* note 420, at xlv.

⁴²³ PARRINGTON, *supra* note 421, at 278.

"the *values* of the upper-middle, professional class"⁴²⁴ fail to recognize that constitutional institutions were designed to promote those values. From the Framers' perspective, constitutional institutions are malfunctioning when government outputs do not reflect the opinions of the best people. The more basic issue underlying debates between constitutional proponents and opponents is whether American constitutional institutions can be structured in ways that insure that elites in power act on the basis of their public values rather than on the basis of their class interests.

Whether best people in power promote their elite interests or their public values is particularly vital when assessing the historical practice of judicial review in the United States. The federal judiciary is the only branch of the national government that presently bears even a dim resemblance to the Framers' vision of institutions staffed by elites not responsive to immediate public whim. As numerous scholars have observed, the natural-aristocratic, republican vision of the Framers broke down from the beginning. "In the generation following the formation of the Constitution," Wood comments, "the anti-Federalist conception of actual or interest representation of government . . . came to dominate the realities, if not the rhetoric, of American political life."⁴²⁵ Ordinary people replaced best men as the ideal legislators in this unforeseen political universe. Andrew Jackson clearly articulated the new American constitutional creed when he informed his fellow citizens that "[t]he duties of all public officers are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance."⁴²⁶ Both American political culture and American political institutions have become even less republican and more democratic during the twentieth century. Voting rights have expanded significantly and the permanent campaign presently structures American political life.⁴²⁷ "No one," Stephen Griffin points out, "today believes America should be ruled by a wealthy,

⁴²⁴ ELY, THEORY, *supra* note 26, at 59 (emphasis added); see Brest, *supra* note 398, at 664–65; Becker, *supra* note 398, at 1019.

⁴²⁵ WOOD, *supra* note 412, at 294; see *id.* at 230–31, 259–67; GRIFFIN, *supra* note 372, at 15. Many of the founding fathers were disgusted by the regime they spawned. See WOOD, *supra* note 412, at 365–66.

⁴²⁶ Andrew Jackson, First Annual Message, in A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1908, at 449 (James D. Richardson ed., 1896); see also A Friend of the Republic, in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 106, at 244 ("[T]here are not such mighty talents [sic], requisite for government as some who pretend to them (without possessing them) would make us believe—Honest affection for the general good and common qualifications are sufficient.").

⁴²⁷ See SIDNEY BLUMENTHAL, THE PERMANENT CAMPAIGN: INSIDE THE WORLD OF ELITE POLITICAL OPERATIVES 7–10 (1980).

propertied, classically educated, agrarian male elite"⁴²⁸—or any other elite for that matter. Griffin concludes that "to the extent Madison's theory depends on such an elite, it appears that his theory, along with much of Federalist thought, is irrelevant to understanding the twentieth-century constitutional order."⁴²⁹

Nonetheless, the federal bench has, for two hundred years, largely withstood the democratic tide that engulfed other republican institutions. This judicial resistance has been bolstered by a set of public understandings put in place at the very moment when other republican institutions were undergoing democratic transformations. By the early nineteenth century, Griffin observes, "the Federalist conception of politics, a conception that emphasized the importance of a guiding virtuous elite, was now seen as applicable only to the judiciary."⁴³⁰ Wood similarly recognizes that courts in Jeffersonian America "seemed the only public place left in democratic America where a trace of classical aristocracy and virtue could be found."⁴³¹ Little has changed. Americans may want ordinary, even mediocre, citizens to represent them in legislatures. President Nixon's failed effort to place Harold Carswell on the Supreme Court suggests that we do not want such persons to sit on the federal bench.⁴³²

That the Court is the last republican bastion in our democratic society does not mean that the justices generally act in a countermajoritarian fashion. Both the appointments process and other political pressures ensure that judicial preferences will remain within a general public consensus.⁴³³ Still, on matters where there is no clear or durable public consensus, justices tend to support those positions favored by elites in our society. Both, for example, favor broad free speech rights and fewer public expressions of religion.⁴³⁴ Such practices are legitimate from a Madisonian perspective only if legal elites are protecting the public good. Judicial review cannot be justified if legal elites are merely advancing their class interests.

A court that protected rights to basic necessities would satisfy the republican requirement that government institutions serve public values. Charles Reich, Frank Michelman, Peter Edelman, and Charles Black will receive few direct benefits should the federal judiciary eventually rule that all persons have a constitutional right to a survival income. These proponents of

⁴²⁸ GRIFFIN, *supra* note 372, at 67.

⁴²⁹ *Id.*

⁴³⁰ *Id.* at 17.

⁴³¹ WOOD, *supra* note 412, at 325; *see also id.* at 323–25.

⁴³² *See* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 15–18 (3d ed. 1992).

⁴³³ *See supra* note 366 and accompanying text.

⁴³⁴ *See* Brest, *supra* note 398, at 65–66; GRABER, *supra* note 36, at 106; Gary Peller, *Creation, Evolution, and the New South*, 2 *TIKKUN* 72 (1987).

welfare rights probably think they will enjoy many indirect benefits from policies they believe will decrease the underclass and poverty in the United States. These benefits, however, cannot be distinguished from the general benefits that accrue from living in a just society.⁴³⁵ Hence, the best explanation for liberal elite commitments to welfare rights during the 1960s seems to be a sincere, perhaps mistaken, belief that welfare rights expressed the best aspirations of the American constitutional order.

Determining whether justices who protect abortion are promoting public values or elite interests is more complicated. Tenured law professors who do not expect that they or close family members will need welfare in the near future recognize that they, family members, or friends may wish to terminate an unwanted pregnancy. Contrary to much evidence suggesting that statutory bans on abortion have not and will not alter elite reproductive options significantly, liberal theorists often write as if they expect to be affected directly should *Roe* be overruled. "The answer to the question why is it so important that abortion access be constitutionally protected is obvious:" an academic lawyer proclaims, "because I or someone I care about may desperately need one, and the vagaries of electoral politics do not guarantee access."⁴³⁶ Significantly, the dominant defense of legal abortion focuses on how abortion rights are necessary to help women achieve or maintain elite status. Pro-choice feminists condemn pro-life policies that "integrally contribute[] to the maintenance of an underclass or a deprived position because of gender status."⁴³⁷ Kristin Luker points out that abortion rights are also important to elite men who prefer spouses that contribute a second income rather than extensive childcare.⁴³⁸ Not surprisingly, the most committed opponents of legal abortion are women who do not wish to become political, economic, or intellectual elites.⁴³⁹

In short, a greater possibility exists that Dworkin, Tribe, and other contemporary liberal supporters of abortion rights are confusing their class

⁴³⁵ Similarly, "the political advantages at home and abroad that would follow abandonment of segregation," that Derrick Bell believes explain the Supreme Court's decision in *Brown* were the advantages that result from doing justice. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980). *Brown* provided "immediate credibility to American's struggle with Communist countries to win the hearts and minds of emerging third world peoples" precisely because that decision offered a measure of justice to persons of color. *Id.*

⁴³⁶ Jean Braucher, *Tribal Conflict over Abortion*, 25 GA. L. REV. 595, 609 (1991); see Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 105 (1989). For similar comments, see GRABER, *supra* note 36, at 4, 19.

⁴³⁷ Law, *supra* note 146, at 1006; see *supra* note 64.

⁴³⁸ See LUKER, *supra* note 223, at 210.

⁴³⁹ See *id.* at 159-76.

interests with public values than Michelman, Edelman, and other supporters of welfare rights are confusing their class interests with public values. This is not to say that the Constitution does or does not protect abortion rights. The point is simply that the case for liberal elites acting as disinterested statespersons is harder to make in the case of abortion than welfare. That contemporary liberal constitutional theorists are confusing class interests with public values seems particularly likely if, as I have argued, no principled distinction can be made within liberal constitutional theory between abortion and welfare rights.⁴⁴⁰ Unless leading constitutional theorists can demonstrate more convincingly why the right to livelihood is one of the few fundamental human rights they believe is not also a judicially enforceable constitutional right, the inference seems clear that liberal elites will fight hard and extensively only for those rights that they perceive as both just and serving their interests.

Great judicial decisions lack this ambivalence. No member of the Court that decided *Brown v. Board of Education* expected to attend an inferior, segregated school. No member of the Court that decided *Gideon v. Wainwright* expected to go to trial without a lawyer. For that matter, neither Justice Holmes nor Justice Brandeis expected to suffer the fate of Jacob Abrams should World War I restrictions on free speech remain the law of the land. As Paul Murphy has noted, such distinguished political actors as Theodore Roosevelt felt free to make criticisms of World War I policies that were quite similar to those that landed radical critics in prison.⁴⁴¹ *Brown*, *Gideon*, and the dissenting opinion in *Abrams v. United States*⁴⁴² articulated what were then (and probably now) elite values concerning civil rights, the rights of persons accused of crimes, and rights to free speech. We celebrate these decisions today because their direct beneficiaries were or would have been less fortunate Americans.

Liberal constitutional theorists insist that courts have a unique capacity to "listen . . . for voices from the margins,"⁴⁴³ a capacity they regard as crucial to any justification of judicial review. This characterization of judicial distinctiveness is clearly wrong in one sense. Given the way different governing institutions are staffed, the federal judiciary, if anything, is likely to be the national institution most attuned to elite values.⁴⁴⁴ Still, *Brown* and *Gideon* demonstrate that elite values can advance the interests of less fortunate Americans. Constitutional commentators and authorities who would have the

⁴⁴⁰ See *supra* Parts II.A.1-2.

⁴⁴¹ PAUL L. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* 84 (1979).

⁴⁴² 250 U.S. 616 (1919).

⁴⁴³ Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1537 (1988); see Owen M. Fiss, *The Law Regained*, 74 CORNELL L. REV. 245, 255 (1989).

⁴⁴⁴ See *supra* notes 430-35 and accompanying text.

judiciary protect fundamental rights to abortion but not fundamental rights to basic necessities, however, can lay no claim to either the unique republican virtues or special capacities to speak for the underprivileged that might justify maintaining judicial review in our increasingly democratic society. No theory of judicial review purports to justify an institution that declares laws unconstitutional only when government policies too severely trench on the interests of the most fortunate Americans.

IV. A SECOND LOOK?

Many leading constitutional theorists advocate doctrines that would require elected officials to take a second look at constitutionally questionable practices. Constitutional errors, in this view, frequently result from the pressures inherent in the legislative process rather than from malevolence or interpretive mistakes. Dean (now Judge) Guido Calabresi points out that "[l]egislators often act hastily or thoughtlessly with respect to fundamental rights because of panic or crises or because, more often, they are simply pressed for time."⁴⁴⁵ The constitutional harms that result from these legislative failings can be mitigated, however, if courts assume that elected officials have authorized some action that may trench on constitutional liberties only when that authorization is clearly stated on the face of the legislation under constitutional attack.⁴⁴⁶ Sandy Levinson, in 1989, suggested that the courts use the Ninth Amendment to require legislatures to take a second look at any government practice that may violate what the Court believes to be fundamental human rights.⁴⁴⁷ Judicial review in these instances does not proclaim to the world that elected officials have made a constitutional mistake. Legislators retain the power to reenact the constitutionally controversial policy, as long as they do so explicitly.⁴⁴⁸ These commentators simply insist that given the importance of the values at stake, courts should make certain that legislative action is based on a more deliberate and self-conscious weighing of important constitutional considerations than appears to have taken place previously.⁴⁴⁹

⁴⁴⁵ Calabresi, *supra* note 26, at 103–04.

⁴⁴⁶ See *id.* at 103–07; Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 58–79 (1961); Alexander M. Bickel & Harry N. Wellington, *The Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 31–35 (1957); ELY, *THEORY*, *supra* note 26, at 169–70.

⁴⁴⁷ See Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 157–59 (1988); see Becker, *supra* note 398, at 977–78.

⁴⁴⁸ See, e.g., Calabresi, *supra* note 26, at 105 n.71 (“Type III review plainly leaves the last word with the democratically elected legislature.”).

⁴⁴⁹ See Bickel, *supra* note 446, at 77; Bickel & Wellington, *supra* note 446, at 27–28.

This Article suggests that liberal constitutional theorists should take a similar second look at their present constitutional commitments. Dworkin, Tribe, and other pro-choice constitutionalists may have good justifications for emphasizing abortion rights at the expense of welfare rights. The problem is that too little public debate has taken place over the present priorities of liberal theory. Some constitutional commentators may be “act[ing] hastily or thoughtlessly with respect to fundamental [welfare] rights,” particularly in light of the reasons that might warrant a greater liberal concern with the constitutional rights⁴⁵⁰ of poor people. Liberals committed to a “republic of reasons”⁴⁵¹ owe impoverished citizens a more convincing explanation of why the Constitution contains a judicially enforceable right to abortion, but no judicially enforceable right to welfare, survival income, or basic necessities. At the very least, liberal constitutional theorists should detail at greater length whether they really believe that abortion has stronger textual, historical, or precedential foundations (before and after 1970) than welfare rights, whether they believe that tactical considerations presently compel liberals to concentrate on abortion rather than welfare, or whether, at bottom, they believe that abortion rights are more fundamental than welfare rights.

This second look may result in more explicit, superior justifications for present liberal priorities. A fuller exegesis might demonstrate that abortion rights have deeper roots than welfare rights in the American constitutional tradition or that sound institutional reasons warrant federal judicial protection for abortion rights but not welfare rights. Some liberal constitutional theorists may even confess that they have rejected the philosophical tenets underlying the Great Society, that although they think abortion is a fundamental human right, they believe that no person in an affluent society has a fundamental human right to basic necessities. This understanding of human rights may be terribly mistaken.⁴⁵² Still, such a moral distinction between abortion and welfare rights would provide a principled justification for the present commitments of liberal constitutional theory.

Liberal theorists who take a second look at their constitutional priorities may also conclude that welfare rights are at least as fundamental as abortion rights. No liberal philosopher thinks that abortion rights are more important

⁴⁵⁰ Calabresi, *supra* note 26, at 103–04.

⁴⁵¹ SUNSTEIN, *supra* note 26, at 17.

⁴⁵² Friends with some justification claim that I never met a progressive tax or spending program that I did not like. My philosophical views on abortion, however, are weakly pro-life. See GRABER, *supra* note 36, at 159–60. I strongly support legal abortion at present only because I am convinced that abortion laws in practice discriminate horribly against poor women and women of color. See *id.* at 39–117.

than welfare rights.⁴⁵³ Welfare rights are at least as well grounded in the American constitutional tradition as abortion rights.⁴⁵⁴ Judicial enforcement of a right to livelihood would not require different constitutional remedies than those liberals presently favor in other areas of constitutional law.⁴⁵⁵ Recent precedent does provide far stronger constitutional grounds for abortion rights than welfare rights. Constitutional theorists, however, should not adjust their more fundamental principles to correspond with what they believe are erroneously decided cases. Adherence to *stare decisis* is particularly unwarranted when the mistaken rulings violate constitutional integrity by privileging rights that advance elite interests at the expense of equally valid constitutional rights that further the life prospects of less fortunate persons. Scholars who believe the Constitution protects welfare rights should feel no more constrained by such recent precedent as *Dandridge* and *Rodriguez*, than the Supreme Court in *Brown* felt constrained by *Plessy v. Ferguson*⁴⁵⁶ and *Gong Lum v. Rice*.⁴⁵⁷ Given the recent run of judicial decisions adverse to welfare rights, liberal constitutional commentators might urge the Supreme Court to develop a more supportive line of precedent before explicitly declaring a constitutional right to welfare. The Hughes, Stone, and Vinson Courts, after all, first established a more supportive line of precedent before ruling that separate was not constitutionally equal.⁴⁵⁸ A truly liberal constitutional theory, however, would not use present judicial hostility as an excuse for abandoning work on the foundations of an American constitutional universe in which all persons are guaranteed meaningful access to basic necessities.

The American law of fundamental constitutional rights is fast approaching a normatively unstable impasse. On the one hand, the Supreme Court is protecting a fundamental right to abortion and is not likely to abandon that protection in the foreseeable future. On the other hand, the justices in every area of law not closely associated with gender or the sexual revolution seem increasingly unwilling to recognize any fundamental right not specifically grounded in constitutional history or the constitutional text.⁴⁵⁹ Chief Justice

⁴⁵³ See *supra* notes 137–45 and accompanying text.

⁴⁵⁴ See *supra* notes 207–243 and accompanying text.

⁴⁵⁵ See *supra* notes 176–84 and accompanying text.

⁴⁵⁶ 163 U.S. 537 (1896), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

⁴⁵⁷ 275 U.S. 78 (1927) (holding that Asian-Americans are not constitutionally entitled to attend a white-only school).

⁴⁵⁸ See *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

⁴⁵⁹ See *Albright v. Oliver*, 510 U.S. 266 (1994) (finding no constitutional right to be free from malicious prosecution); *Reno v. Flores*, 507 U.S. 292 (1993) (holding that children

Rehnquist, Justice O'Connor, Justice Scalia, and, somewhat surprisingly, Justice Ginsberg, in 1994, explicitly asserted that they would be "reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended."⁴⁶⁰ "The protection of substantive due process," the Court continued, "have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity."⁴⁶¹ In short, liberal theories of constitutional interpretation presently seem good only for the family of cases closely associated with *Roe*. American law evaluates other claims of fundamental constitutional rights using far more conservative methods of constitutional interpretation.⁴⁶²

This status quo violates constitutional integrity. If, properly interpreted, the Constitution does not protect any fundamental right that lacks specific constitutional roots, then the judiciary should move to overrule *Roe* or provide some other grounding for the constitutionality of legal abortion.⁴⁶³ If, however,

of aliens have no constitutional right to have the state determine whether they would be better off in public or private custody); *Collins v. City of Harker Heights*, 503 U.S. 115 (1992) (holding that government employees have no constitutional right to be warned about potentially fatal hazards in their workplace); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (holding that a natural father has no constitutional right to visit a child born to a mother married at the time to another man); *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (holding that children have no constitutional right to be protected against private violence, even when government officials are aware or should be aware that child abuse is taking place).

⁴⁶⁰ *Albright*, 510 U.S. at 271-72 (quoting *Collins*, 503 U.S. at 125).

⁴⁶¹ *Id.* at 272.

⁴⁶² See *Michael H.*, 491 U.S. at 121-30; *Collins*, 503 U.S. at 124-30; *Reno*, 507 U.S. at 301-05; *Albright*, 510 U.S. at 271-75; see also Raoul Berger, *Liberty and the Constitution*, 29 GA. L. REV. 585, 593-94 (1995) (discussing how "the Court . . . is putting the brakes on fresh claims of rights unknown to the law").

The judicial majority in *Bowers v. Hardwick*, 478 U.S. 186 (1986), relied heavily on conservative understandings of constitutional theory when rejecting a claim that persons had a fundamental right to engage in sodomy. For reasons discussed above, *Bowers* may not be long for this constitutional world. See *supra* note 401 and accompanying text.

⁴⁶³ Claims that bans on abortion violate the equal protection rights of women are likely to prove equally problematic. The persons responsible for the Fourteenth Amendment did not intend to prohibit laws discriminating against women. See Earl M. Maltz, *The Constitution and Nonracial Discrimination: Alienage, Sex, and the Framers' Ideal of Equality*, 7 CONST. COMMENTARY 251, 266-82 (1990). Moreover, flat bans on abortion do not violate equal protection in a traditional sense because such measures do not give men legal rights denied to women. Thus, feminists who oppose welfare rights must explain why equal protection should be interpreted liberally in gender cases, but strictly construed when poor people claim violations of constitutional equality.

Roe was correctly decided, then the fundamental rights reasoning of that decision cannot consistently be confined only to the constitutional law of privacy. Constitutional commentators and authorities living in a constitutional universe that considers *Roe* to be a valid precedent must ask what other fundamental rights can be justified using the same constitutional modalities that justify judicial solicitude for abortion rights. Liberals who believe welfare rights enjoy the same philosophical and historical support as abortion rights, therefore, should forthwith develop constitutional theories in which rights to basic necessities play as central a role as abortion rights.

This normatively unstable status quo, unfortunately, may be a political equilibrium point. In a political universe where money talks louder than needs,⁴⁶⁴ the polity is likely to recognize those rights that affluent Republicans and affluent Democrats recognize, fight over those rights that affluent Republicans and affluent Democrats fight over, and exhibit little interest in those rights that fail to interest either affluent Republicans or affluent Democrats. Pro-choice concerns (other than funding) may thrive in this political culture because elites of all political persuasions tend to exhibit strong support for abortion on demand.⁴⁶⁵ Welfare rights are likely to receive little political attention because such issues do not appeal to politically crucial voters or investors.⁴⁶⁶ Constitutional theorists probably can do little to challenge this dreary political climate. Nonetheless, by convincing liberal lawyers that a commitment to *Roe* need not entail a commitment to a judicially enforceable right to basic necessities, Dworkin, Tribe, and other pro-choice constitutionalists provide a liberal veneer to a profoundly discriminatory regime.

Law review essays that cannot change the world dramatically may nevertheless influence legal consciousness. A greater focus on the rights of poor people might persuade existing and potential liberal federal justices that their

⁴⁶⁴ For studies on the influence of money in contemporary politics, see THOMAS BRYNE EDSALL, *THE NEW POLITICS OF INEQUALITY* (1984); THOMAS FERGUSON, *GOLDEN RULE: THE INVESTMENT THEORY OF PARTY COMPETITION AND THE LOGIC OF MONEY-DRIVEN POLITICAL SYSTEMS* (1995); THOMAS FERGUSON & JOEL ROGERS, *RIGHT TURN: THE DECLINE OF THE DEMOCRATS AND THE FUTURE OF AMERICAN POLITICS* (1986); KEVIN PHILLIPS, *THE POLITICS OF THE RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH* (1990).

⁴⁶⁵ See Robert Lerner et al., *Abortion and Social Change in America*, 37 *Soc'y* 8 (1990); GRABER, *supra* note 36, at 144-45.

⁴⁶⁶ See EDSALL, *supra* note 464, at 23-67 (discussing how the increasing need for political contributions has weakened the influence of the poor on the Democratic party); FERGUSON & ROGERS, *supra* note 464, at 138-61; STANLEY B. GREENBERG, *MIDDLE CLASS DREAMS: THE POLITICS AND POWER OF THE NEW AMERICAN MAJORITY* 23-54 (2d ed. 1996) (discussing middle class hostility to welfare rights).

support for abortion rights entails support for rights to basic necessities. Eisenhower justices, appointed to the Court because they supported the result in *Brown*,⁴⁶⁷ proved willing to support numerous other claims that they believed had equally valid constitutional foundations. Perhaps future justices appointed because they support the result in *Roe* will prove more sympathetic to the equally valid constitutional rights of the poor.

Constitutional theories concerned with the rights of impoverished Americans might also inspire a second look at the too common practice in much contemporary legal literature of establishing authority by declaring victim status.⁴⁶⁸ Hierarchies exist in the legal academy as they do elsewhere. "Untouchables" in the law professorate, however, enjoy privileges that the overwhelming majority of persons on this planet cannot even dream of. Elite law professors who pose as "outsiders" risk confusing the interests of the least high-and-mighty with those who are truly low-and-powerless. Liberal abortion policies and bans on hate speech or pornography, in their writings, tend to replace food and shelter as basic needs. These priorities may be shared by upwardly mobile law students, but probably seem perverse to those persons who clean law offices and restrooms for a fraction of the pay that first year lawyers and academics command. A constitutional theory that focused on the rights of persons who live in the streets and beg for scraps of garbage to eat might remind us that—contrary to what we sometimes read in our journals—law professors, law students, and even political scientists are not the wretched of the earth.

⁴⁶⁷ See Michael A. Kahn, *Shattering the Myth About President Eisenhower's Supreme Court Appointments*, 22 PRESIDENTIAL STUD. Q. 47, 47 (1992) (using "a discussion of each of Eisenhower's five appointments to the Supreme Court" to demonstrate how "Eisenhower [or, more accurately, the Eisenhower Justice Department] clearly and undeniably attempted to influence the Supreme Court in the direction of entrenching *Brown*").

⁴⁶⁸ For a good collection of some leading works of so-called "outsider scholarship," see MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993).